SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(SOUTHERN DIVISION.)
1948

Volume I
(Part 3)

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CASE No. 19.

WANA TSWELA *v.* DAFI TSWELA.

BUTTERWORTH: 21st September, 1948. Before Cornell (Acting President), Leppan and Bowen, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Enquiry under section 3 (3) *of G.N. No.* 1664 *of* 1929—*Proceedings to be conducted* de novo—*Costs—Absence of party to proceedings.*

Appeal from the Court of the Native Commissioner, Nqamakwe.

Leppan (Member) delivering the judgment of the Court:

This appeal arises out of an enquiry held by the Assistant Native Commissioner, Nqamakwe, under the provisions of section 3 (3) of Government Notice No. 1664 of the 20th September, 1929, to determine who is the heir to the estate of the late Donkey Tswela, in view of the conflicting claims of Wana Tswela and Dafi Tswela.

According to the record it is common cause that Donkey died childless, and had no brothers. He was predeceased by his late father Lizani. Lizani's brothers were Ntlanganiso, Qondani and Qayiso. Both the former are deceased, but as the eldest, Ntlanganiso and his issue have prior rights of succession against Qondani, the next brother, and Qayiso the youngest brother.

It is alleged that Ntlanganiso had a son, Wana, who should succeed in precedence to Dafi, the son of the late Qondani. Dafi has contested Wana's claims on the ground that he is not the son of Ntlanganiso; and it is this dispute which the Assistant Native Commissioner had to investigate, as he proceeded to do under the provisions of the Government Notice already mentioned.

Neither Wana nor his mother Agnes, were present at the enquiry when the Assistant Native Commissioner found that Dafi was the heir.

Against this finding Wana has appealed on the grounds:—

(1) That the judgment is against the weight of evidence; and

(2) that it is against the law in that—

(*a*) the Assistant Native Commissioner did not summon before him all the parties concerned, viz., Wana Tswela and his mother, Agnes, as he is required to do by section 3 (3) of Government Notice No. 1664 of 1929;

(*b*) the claimant, Wana, has been substantially prejudiced by the failure of the Assistant Native Commissioner to call the weighty evidence of his mother.

Now according to the provisions of section 3 (3) of Government Notice No. 1664 of 1929, the terms of which are peremptory, . . . "the Native Commissioner shall summon before him all the parties concerned and such witnesses as he may consider necessary". The Assistant Native Commissioner has not complied with these terms in that he conducted the enquiry in the absence of Wana and has also failed to call an important witness, Agnes, who is the person best able to give evidence concerning her son's pedigree. The evidence in this respect discloses that Wana was born to Agnes, the widow of Ntlanganiso, after the latters' death and away from his kraal.

A son born away from the kraal of his mother's husband to a widow who has left her late husband's kraal with the consent of his people can succeed to her husband. Gade *v.* Gqagqeni, 1944 N.A.C. (C & O.) 85.

In the circumstances and in accordance with the decision in Mantanga *v.* Mantanga, 1938 N.A.C. (C. & O.) 65 the appeal is allowed with costs and the proceedings before the Assistant Native Commissioner are set aside; the enquiry should be conducted *de novo.*

Argument has been addressed to this Court concerning the question of costs of appeal. While Mantanga's case supra appears to be an authority for making no order as to costs we consider that it is distinguishable in that in that matter both parties were absent from the enquiry and neither had the opportunity of protesting to the Native Commissioner concerning the irregularity, whereas in this matter

respondent, who is presumed to know the law, was present and had that opportunity of drawing the Assistant Native Commissioner's attention to the irregularity of proceeding in the absence of the other party. He is, therefore, not entitled to any special indulgence from the Court, which must follow the general rule that the successful party is entitled to his costs.

For Appellant: Mr. Mahoud, Butterworth.

For Respondent: Mr. Kockett, Nqamakwe.

CIVIL CASE.

CASE No. 20.

NOMEVA NTONZINI *v.* MABUTI NTSUME.

BUTTERWORTH: 21st September, 1948. Before Cornell (Acting President), Leppan and Bowen, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Land Enquiry—Heir—Instructions as to procedure.

Appeal from the Court of the Native Commissioner, Tsomo.

Cornell (Acting President) delivering the judgment of the Court:

This is an application for condonation of late noting of an appeal in a land enquiry in which Nomeva Ntozini (appellant) claims to succeed to Lot No. 367, Qombolo Location, District Tsomo. The Native Commissioner found " that Mabuti Ntsume (respondent) is the heir to this lot and is entitled to obtain transfer to his name of the lot in question ".

At the Native Commissioner's enquiry neither party was legally represented, but both were present in person. The finding was announced on 26th February, 1948, an appeal was noted on 29th April, 1948, and the application is for condonation of this late noting.

An affidavit by the applicant is filed and this discloses that he did not know that he should have noted his appeal within 21 days and further that he awaited his attorney who was absent through illness during March and April, 1948, in order to instruct him to note an appeal. The many decisions of this Court disclose that neither of these representations is a sufficient ground, either alone or collectively, to warrant this Court granting its indulgence.

The dicision in Qina *v.* Qina, 1939 N.A.C. (C. & O.) 41 lays down clearly the course to be followed in matters of this nature. It furthermore requires consideration of decisions of the Appellate Division. The latter Court in De Villiers *v.* De Villiers, 1947 (1) S.A.L.R. 635 lays it down that an application for condonation may be refused on the sole ground that there are no prospects of success in the appeal as found from the judgment of the lower Court. The decision in Cairn's Executors *v.* Gaarn (1912 A.D. 186) wherein *Innes, J.A.*, laid it down that the applicant might show such merits as would justify the Court in granting relief even though the delay was abnormal is distinguished by the learned Judge in De Villiers *v.* De Villiers *supra* who expresses it as indisputable that the converse holds good. On this authority this Court is therefore entitled to refuse an application for condonation when there is such lack of merits in the appeal as to justify the Court taking such a view. This does not imply that this Court in similar applications will give consideration to and go fully into the merits of the matter in order to estimate the applicant's chances but, following De Villiers *v.* De Villiers *supra*, it will go so far as to satisfy itself from the judgment itself that the applicant has no prospect of success. In this present matter the applicant has no prospect of success. Respondent's claim to be the son of one Batai, the holder of Lot No. 367, is questioned by applicant on the sole ground of a statement alleged to have been made to him by Batai during the latter's lifetime, that respondent, Mabuti, was not his son. This alone is insufficient to upset the Native Commissioner's judgment and the application is refused with costs.

Enquiries of the nature of this one are quasi-judicial and although Native Commissioners do not always have the benefit of legal representation of the parties, it behoves them to approach these matters with more attention to the possible effects of the results of their inquiry and not to conduct an inquiry in the haphazard and sketchy manner which the record in this case indicates. Attention is therefore invited to this aspect as an injustice can easily be done by a failure to address to such a matter a proper judicial attitude. We are however satisfied, in this case, after careful consideration that no injustice has been suffered by either party.

There is nothing in the record to show under what authority this inquiry was held, but it is accepted that it was conducted in terms of Government Notice No. 1664 of 1929. The latter designates the responsible officer as being the Native Commissioner and where no such officer is appointed then that officer is the Magistrate. This inquiry was conducted by an officer holding an appointment as Native Commissioner as well as that of Magistrate and he used this latter designation in this inquiry. This is irregular but no objection was raised to this irregularity. This Court has frequently had occasion to invite attention to these and other irregularities and it is expected that this cause of complaint will now cease.

For Appellant: Mr. Mahoud, Butterworth.

For Respondent: Mr. Dold, Willowvale.

CASE No. 21.

ZEMBE HELE *v.* NZOLOMBA NGWANYA.

BUTTERWORTH: 21st September, 1948. Before Cornell (Acting President), Leppan and Bowen, Members of the Court (Southern Division).

Native Appeal Case—Marriage by Native Custom—Engagement cattle—Pregnancy of girl by another man—Return of dowry paid before marriage ceremony.

Appeal from the Court of the Native Commissioner, Willowvale.

Cornell (Acting President) delivering the judgment of the Court:

Plaintiff sued defendant for four head of cattle or their value £12 each and £12 in cash. He set out in his summons these particulars:—

"1. Plaintiff engaged to marry defendant's daughter according to custom and in or about June, 1947, actually delivered to defendant four head of cattle as 'lobola' being one Nqilokazi cow, one black heifer and two red and white nco oxen plus £12 in cash which was paid to defendant in or about July, 1947.

2. Defendant failed to carry out the engagement to marry and the said girl had since become pregnant by another man.

3. Defendant retains possession of the said four head of cattle and £12 in cash which remains the property of plaintiff and defendant refuses to deliver same to plaintiff despite legal demand."

To this defendant after further particulars had been obtained showing that plaintiff was the son of one Harry Ngwanya pleaded an admission of the facts of paragraph 1 of plaintiff's particulars adding that £12 represented one beast. After admitting possession of the cattle described and the cash, his refusal to deliver same and the receipt of the demand, defendant denies all plaintiff's other allegations and continues:—

"(*a*) That it is the plaintiff who is failing to carry out the engagement to marry the defendant's daughter.

(*b*) That it is the plaintiff who seduced and made pregnant plaintiff's daughter, who gave birth to a child in or about September, 1947, of which child plaintiff is the father.

(*c*) That by reason of plaintiff's failure to carry out the engagement he has forfeited the dowry already paid and in any case defendant is entitled to same as a fine for the aforesaid seduction and pregnancy."

To this plea plaintiff replied as follows:—

"1. That the said engagement was entered into on behalf of plaintiff and with plaintiff's approval by plaintiff's father, Harry Ngwanya, during plaintiff's absence at work in the Cape.

2. That unknown to plaintiff and his representatives defendant's said daughter was pregnant at the time the engagement was entered into.

3. That plaintiff left for the Cape on or about the 6th day of October, 1946, and did not return to Willowvale until in or about the end of January, 1948.

4. That plaintiff was at all times willing to proceed with the aforesaid engagement until he discovered the previous pregnancy of defendant's said daughter.

5. That plaintiff denies that he at any time seduced defendant's said daughter or caused her pregnancy.

6. That defendant's said daughter gave birth to a child in or about November, 1947 at Umtata."

Judgment was given for plaintiff "for 4 head of cattle or their value at £12 each, £12 in cash together with the increase of a red bull tollie. Defendant to pay costs". Against the whole of this judgment defendant appeals on the ground that it is against the weight of evidence.

The crisp point for decision in this matter is, as stated by the Native Commissioner in his reasons for judgment, whether plaintiff was responsible for the seduction and pregnancy of defendant's daughter Eunice.

Briefly the facts from the evidence are that plaintiff and the girl Eunice were intimate up to the time of plaintiff's departure for work at Somerset West—during October-November, 1946. In 1947, fixed as June by plaintiff's father and as May by defendant, plaintiff's father engaged Eunice for his son by payment of the cattle in dispute. During July, 1947, Eunice disappeared and reported to her father by letter that she was pregnant. This information reached plaintiff and his father who were then both at work at Somerset West. After consultation with plaintiff the latter's father instructed his relatives to claim a refund of the engagement cattle and on his return from work, caused a demand to be issued. Eunice avers her child was born on 16th September, 1947, and the evidence to contradict this is quite unreliable.

The Native Commissioner rejected Eunice's testimony as unreliable and gave judgment for plaintiff.

It is admitted by plaintiff and confirmed by Eunice that the two were accustomed to *metsha* and it has been argued that, by virtue of this admission of plaintiff, there is a heavy onus on him to prove that he was not the father of Eunice's child. Plaintiff has handed in a pass which was issued to him at Willowvale on 30th September, 1946, and which was valid for 14 days. He asserts that he left for Somerset West during the period of validity thereof. This is sufficient to discharge the onus resting on him because not only has defendant failed to prove his suggestion that plaintiff exchanged passes with one Alfred Somciza (to whom it has been shown that a pass was issued on 15th November, 1946) but also Eunice herself admits having menstruated normally at the end of October, 1946. Therefore plaintiff's assertion that he left for Somerset West before 14th October, 1946, stands unrebutted and by virtue of Eunice's admission that she only fell pregnant in November, 1946, plaintiff has discharged the onus that rests on him.

The Native Commissioner's judgment is for cattle valued at £12 each. This value is in excess of the value fixed by this Court for cattle in cases of this nature. Mr. Dold admitted that the defendant in his plea accepted this as being the value placed on the cattle. This Court therefore accepts this value.

The Native Commissioner has, in the opinion of this Court, arrived at the correct decision and the appeal is dismissed with costs.

For Appellant: Mr. Dold, Willowvale.

For Respondent: Mr. Wigley, Willowvale.

CASE No. 22.

MNYAMEZELI DUMALISILE *v.* DWAYI DUMALISILE.

BUTTERWORTH: 21st September, 1948. Before Cornell (Acting President), Leppan and Bowen, Members of the Court (Southern Division).

Native Appeal Case—Heir of Qadi House—Unlawful disposal of property—Heir of Great House—Entitled to dowry of daughter of Great House.

Appeal from the Court of the Native Commissioner, Willowvale.

Cornell (Acting President) delivering the judgment of the Court:

Plaintiff, respondent in this appeal, sued defendant (appellant) for (1) delivery of 7 head of cattle or their value £70 and (2) payment of the sum of £70 as damages for property unlawfully disposed of by him. In his summons plaintiff alleges:—

1. Plaintiff sues in his capacity as the eldest son and heir of the Great House of the late Dumalisile Ncapayi in his lifetime the heir of the Great House of the late Ncapayi who was the heir of the Right Hand House of the late Gcaleka Chief Hintsa.
2. Defendant is the eldest son and heir of a Qadi of the Great House of the late Dumalisile Ncapayi and resides with his mother Nokausi at a kraal established by the said Dumalisile in his lifetime for the use of his (Dumalisile's) mother, Nomonti.
3. In his lifetime the late Dumalisile placed certain cattle the property of his Great House, at the kraal mentioned above for the maintenance of his said mother Nomonti. When his mother became too old to manage for herself he established his wife Nokausi and her family at the said kraal to care for her.
4. During his lifetime Dumalisile gave in marriage his daughter Nobesenti, eldest daughter of his wife Nokausi, and received certain dowry cattle in respect of her which dowry is the property of his Great House as the major house which provided the dowry cattle paid in respect of her mother Nokausi. The said cattle remained at the kraal occupied by his mother and his wife Nokausi and in 1941 they numbered thirteen head. There have since been two increase thereof that plaintiff knows of.
5. In addition to the aforegoing 15 head of cattle there were in 1941, 5 other cattle at the kraal belonging to the Great House of Dumalisile, four being the progeny of a dowry of a girl named Notwashume, and one the progeny of the dowry of a girl Nontwentsha. There has, to plaintiff's knowledge, been one increase of these cattle.
6. After the death of Dumalisile, which took place during 1938, the aforesaid cattle were transferred in the Dipping Registers from his name to that of Nokausi for dipping purposes but there was no question of any dispute that the ownership therein was vested in the plaintiff as heir of his Great House.
7. Later the plaintiff's rights as heir of his father's Great House were contested and an action brought in this Court against plaintiff, but such action was unsuccessful, and an appeal dismissed. Subsequent to this action in 1941, plaintiff learned that his rights in the aforesaid 18 cattle which were in existence at that time were disputed by defendant who wrongfully claimed them as his property. Plaintiff thereupon immediately caused legal demand to be made upon defendant for delivery of the said animals and then issued summons. The summons, however, lapsed, owing to defendant's illness and to the fact that plaintiff was endeavouring to get the matter settled out of Court, this being a family dispute.
8. Since then the defendant has failed to deliver any of the stock and has wrongfully disposed of 14 head thereof valued at £70. Defendant has now in his possession 7 of the aforesaid cattle which he withholds from the plaintiff, to wit:—

   1 red cow and its red bull calf, 1 ntsundu ox, 1 red rwanqa ox, 1 white ngwevukazi cow, 1 nkone ox and 1 young red heifer which at present day values, the plaintiff values at £10 each.

To this defendant pleaded:—

1. Paragraph one of the summons is admitted.
2. The defendant is the eldest son and heir of the Xiba House of Ncapayi.
3. Paragraph three of the summons is denied. Such cattle as were in that Xiba House belonged to that House.
4. Paragraph four of the summons is denied. It is denied that the Great House is entitled to any replacement of cattle and the numbers of cattle mentioned are also denied.
5. Paragraph five of the summons is denied.
6. The plaintiff's right to any cattle has always been denied and disputed.
7. Paragraph seven is admitted.
8. Paragraph eight of the summons is denied. There is no cattle belonging to the plaintiff at the defendant's kraal.

The Native Commissioner gave judgment for plaintiff for 21 head of cattle or payment of their value £105.

Defendant has appealed on the grounds that the evidence does not support the finding of the Native Commissioner.

In the Court below the only evidence led is that of plaintiff and his witnesses, Thomas (his brother) and one Lumkili Tunzi, a relation of the plaintiff. Defendant chose, at the close of plaintiff's case not to lead any evidence and now attempts to discredit the evidence led.

It is significant that plaintiff has been put to considerable expense and trouble to establish, in law, the status he avers in paragraph 1 of the annexure to his summons. He defended an action brought by one Elliot Ntlwati Dumalisile to have himself declared heir to the late Mkenazo Dumalisile and was successful. His status was confirmed on appeal. [Elliot Ntlwati Dumalisile *v.* Dwayi Dumalisile, 1939 N.A.C. (C. & O.) 87.] When this fact is considered with the fact that plaintiff went to much trouble to bring defendant before the Court and that then defendant gave no evidence, some light is thrown on the apparently excessive delay which has occurred in bringing this matter to trial.

In 1938 Mkenazo Dumalisile died. After plaintiff's status was confirmed by the Court in 1939, he, plaintiff, waited until 1941 before he issued summons against defendant in this matter. He allowed this summons to lapse because of defendant's illhealth and because he hoped to settle this matter amicably at home. Eventually in October, 1946, the summons in the present matter was issued. On its coming to trial on 11th April, 1947, defendant personally was absent and evidence was led to show that he was able to attend. This led to a postponement but evidence commenced on 1st July, 1947, and after postponement on that date a further five postponements were granted, none of which were at plaintiff's request. It is therefore apparent that the delay in bringing this matter to trial is not such that it can be counted against plaintiff but is rather evidential of his forbearing attitude.

It is not necessary to reiterate what is set out in the particulars of summons as this clearly epitomises the facts deposed to by plaintiff and his witnesses. Now *McLoughlin* (President) in Elliot Ntlwati Dumalisile *v.* Dwayi Dumalisile *supra* states, *inter alia*, that "it is the plaintiff who must prove his assertion that he is heir and not for defendant to prove his denial and traverse of plaintiff's claim". This axiom applies in this matter where plaintiff has asserted that defendant is the eldest son and heir of a Qadi of the Great House of the late Dumalisile. Once plaintiff has discharged that onus it falls on defendant to prove his assertion, namely that he is a son in the Xiba House. The latter type of House, according to Jonginamba *v.* Mva Jonginamba, 1 N.A.C. 104, is found only among people of Royal blood and its establishment, being of a special nature, must be proved by clear evidence. Plaintiff states that defendant's status is that averred by him and in support shows that Nomonti, the great wife of the late Ncapayi and mother of the late Dumalisile was established in her own kraal and that Nokausi, defendant's mother, was placed there to cook for her. He states that his father had five wives in his Great House, his, plaintiff's mother, Nowaka, being first and Great wife while Nokausi was a qadi to Nowaka's house. He denies that Nokausi was a Xiba wife. He continues that at an investigation by Chief Bishop, after the death of Dumalisile in 1938, defendant who was present did not claim that his

mother was a Xiba wife· but admitted that his mother was a qadi. Nokausi, defendant's mother, is still alive and would thus be able to testify to her status. At this stage therefore the onus shifts to defendant and it now becomes necessary for him, with clear evidence, to prove his claim to be of a Xiba House. Defendant has adduced no evidence in that respect but has relied on cross-examination of plaintiff and his witnesses. This cross-examination is unconvincing and in no way shakes plaintiff's evidence of defendant's status.

Turning now to the cattle in question, plaintiff admittedly does not know much of their origin but he asserts that some are cattle placed with Nomonti and others are the remainder and/or progeny of dowries received for the eldest daughter of Nokausi, Nobesenti; for the plaintiff's sister, Notwashume and for Nontwentsha, a daughter of a Qadi of Nomonti. He avers that Nokausi's dowry was paid out of cattle belonging to Nowaka's house and that Nobesenti's dowry, being in replacement, were the property of Nowaka's kraal. There is no doubt about the destiny of the dowry of Notwashume, plaintiff's sister, but in regard to Nontwentsha's dowry plaintiff avers "This dowry belonged to Nomonti as Nontwentsha mother's dowry came out of Nomonti's House". In cross-examination plaintiff states that the cattle of these three dowries, were, with some deductions, placed at Nomonti's kraal for her support and were not allotted to Nokausi as the Qadi of the Great House. These statements stand uncontradicted and unrebutted by defendant and must be accepted as correct. It is clear, therefore, that the cattle placed with Nomonti and the remainder of the dowries of Nobesenti, Notwashume and Nontwentsha placed at Nomonti's kraal for her support, are the property of the plaintiff.

It now remains to be seen whether plaintiff has proved that he is entitled to the number of cattle claimed. That he is entitled to cattle in the possession of defendant is unrebutted because defendant is the heir of the Qadi of the Great House and as such in charge of the cattle at Nomonti's kraal. Both plaintiff and his brother Thomas give somewhat sketchy evidence relating to these cattle but plaintiff says that "Lumkile knows the cattle" and "Lumkile guards the cattle for me" while Thomas avers that "defendant, Lumkile and Mtenga were in charge of the cattle at that (Nomonti's) kraal". This is also unrebutted and thus Lumkile's evidence is the best evidence tendered to the Court in this respect. Lumkile testifies to there being 18 cattle, the property of plaintiff in defendant's charge in 1941· when the first summons was issued. Although there are discrepancies in the evidence given by plaintiff, Thomas and Lumkile in regard to the cattle, when the three sets are compared, these discrepancies do not destroy the value of their evidence. In 1941 plaintiff's claim as heir, had accrued and defendant as custodian must account to him for the cattle in his charge at that time, plus increase. There is thus no doubt that plaintiff has proved that he is entitled to the 21 head of cattle for which he has been given judgment.

It was suggested that this Court might see fit to send the record back for further evidence. That is unnecessary. Defendant had the option at the close of plaintiff's case of applying for absolution but he did not. Had he done so there was no prospect of succeeding. Not having done so, he should then have placed such evidence as he had before the Court. Evidence, available for the elucidation of facts, which is not placed before the Court leads to the inference that such facts will expose other facts unfavourable to the party who fails to adduce this evidence [Elgin Fireclays Ltd. *v.* Webb, 1947 (4) S.A.L.R. 744]. That there was evidence available to defendant to call is clear. He could himself have testified, while his mother Nokausi could have given evidence, and there is possibly Mtenga, said by Thomas to have been in charge of the cattle.

Plaintiff has established his claim and has also proved that he is entitled to 21 head of cattle. He has not proved the enhanced value claimed in his summons, which, however, does assert his right to 21 head of cattle. The Native Commissioner therefore correctly decided this matter and the appeal is dismissed with costs.

For Appellant: Mr. Swan, Kentani.

For Respondent: Mr. Dold, Willowvale.

CASE No. 23.

QOVANA MBAMBA *v.* QEKEZA KEPUZAYO AND ANO.

PORT ST. JOHN: 29th September, 1948. Before Warner (Acting President), Grant and King, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Elopement—Mvulamlomo beast—Agreement of marriage—Refusal to pay dowry—No order as to return of the girl—Damages —Poudo custom.

Appeal from the Court of the Native Commissioner, Bizana.

Warner (Acting President) delivering the judgment of the Court:—

Plaintiff's claim against defendant is as follows:—

(1) Plaintiff is the father and guardian of his daughter Masitenga; second defendant is the father of first defendant and is head of the kraal at which both defendants reside and as such is jointly liable with first defendant for torts committed by the 1st defendant.

(2) About three months ago the first defendant eloped with the said Masitenge and took her to the defendant's kraal and has since then lived and still is living with her in cohabitation.

(3) On the elopement being reported to the plaintiff he demanded £8 as Mvulomlomo which the defendant paid and thereupon the plaintiff agreed to a native customary union being entered into between his daughter and the first defendant on the payment of dowry as follows: 20 sheep, 2 horses, saddle and bridle and 3 oxen.

(4) Defendant failed to pay all or any of the dowry demanded save that a messenger sent by defendants described a certain cow which he said defendants were willing to pay as dowry which cow has not been shown to the plaintiff.

(5) On defendant's failure to pay dowry the plaintiff made complaint to the Assistant Native Commissioner, Bizana, and on the defendants being brought before him the second defendant stated that he was unable or unwilling to pay dowry for the plaintiff's daughter and first defendant was apparently unable to pay dowry but notwithstanding same the defendants still retain plaintiff's daughter at their kraal against the will of the plaintiff.

(6) By reason whereof the plaintiff has suffered damages in 5 head of cattle or £25.

Defendant pleaded as follows:—

(1) Para. 1 of the particulars of claim is admitted and the remaining allegations therein are denied.

(2) Defendant denies that Qekeza eloped with Masitenge to the defendant's kraal and says that he took her to the kraal of his uncle Mgana where, as far as defendant knows, she still is.

(3) On defendant Qekeza reporting the elopement to defendant the latter refused to pay any dowry as he has already paid 9 head of cattle for Qekeza's first wife and Qekeza thereupon undertook to pay dowry himself and defendant then provided him with the sum of £8 which Qekeza himself caused to be paid to plaintiff; defendant informed Qekeza that this was the only payment he was prepared to make.

(4) Defendant denies that he has ever described or promised to pay any cow or other beast to plaintiff.

(5) Defendant admits the meeting before the Assistant Native Commissioner and pleads that he there expressly stated his refusal to pay any dowry for Qekeza and informed plaintiff that he personally had nothing to do with Masitenge and that plaintiff was at liberty, as far as defendant was concerned, to remove her at any time from Mgano's kraal over which kraal the defendant has no authority.

(6) Defendant denies that Masitenge has ever been at his kraal and that he has ever detained her from plaintiff and defendant denies that plaintiff is entitled to any damages from him for her detention.

(7) Defendant consents to judgment for a bopa beast or £5 and costs to date and pleads that the payment of £8 paid prior to summons is more than sufficient to cover this liability.

At the hearing no evidence was led as it was stated that this was a test case to ascertain if the Court could order the return of the girl in view of the fact that she was a free agent and award damages for her detention.

After argument the Assistant Native Commissioner gave judgment for a bopa beast or £5 and costs to date of plea, by consent, claim for the return of Masitenge and damages in £25 dismissed with costs from date of plea.

Defendant has appealed against this judgment on the following grounds:—

That the judgment is wrong in law in that it is clear from the pleadings that the plaintiff has been deprived of the custody of his daughter who has been taken to the defendant's kraal under a pretence of an offer of marriage and that the defendants have not paid to the plaintiff any dowry; it is therefore submitted that under Native Law and custom the defendants are obliged to place the plaintiff's daughter back at his kraal and are liable to the plaintiff in damages for retaining her at their kraal without payment of dowry.

At the request of Counsel in this Court the question as to whether damages could be claimed in the circumstances disclosed was put to the Native Assessors and their replies are attached.

We accept the statement that plaintiff has no claim under native custom for damages for detention of his daughter in the circumstances disclosed and consider that the dismissal of his claim was correct.

It is unnecessary for us to decide whether plaintiff could bring an action for *lobola* as the only point at issue is as to whether damages for detention of his daughter are claimable by plaintiff.

The appeal is dismissed with costs.

Opinion of Native Assessors.

[Names of Assessors: Gobo Notobela (Flagstaff), Tolikana Mangala (Libode), Johnson Hlwatika (Ngqeleni), Ndomba Buji (Port St. Johns) and Nyamambi Mjiba (Lusikisiki).]

Question: A man elopes with a girl and takes her to his uncle's kraal although he resides at his father's kraal. The matter is reported to the father who states that he has already paid lobola for his son's first wife and will not pay lobola for a second one but he pays a "bopa" beast and refuses to have the girl at his kraal. The girl remains at the kraal of the young man's uncle but is not detained there against her will. If no lobola is paid for the girl has the father any action for damages for harbouring her?

Answer (per *Tolikana Mangala*): The girl's father has no claim for damages because, by accepting a beast while his daughter remains with a man with whom she eloped, he is consenting to her marriage. He could however sue the man's father for lobola. When a "bopa" beast is paid, the girl must be returned to her father with the beast. If a man's father pays a beast without returning the girl, he makes himself liable for payment of her lobola. We practice the *teleka* custom but in these special circumstances an action can be brought for the payment of lobola which is usually for about ten head of cattle. The *Mvulamlomo* beast does not apply in this case because that is the beast which a young man pays to open negotiations with the girl's father when asking for his daughter.

All agree.

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. C. Stanford, Lusikisiki.

NOWE ZINGELA *v.* DAMANETI GALELA.

CASE No. 24.

PORT ST. JOHN: 29th September, 1948. Before Warner (Acting President), Grant and King, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Heir and guardian—Dowry—Accrual to heir where father died—Mother of heir returned to his kraal—Practice and Procedure —Appeal from Chief's Court.

Appeal from the Court of the Native Commissioner, Flagstaff.

Warner (Acting President) delivering the judgment of the Court:

Plaintiff claimed from defendant in the Court of Chief Botha Sigcau an order declaring plaintiff to be the guardian and heir of three girls named Qasheka, Qondani and Pangiwe and that he is as such entitled to their dowry or any other payments made or to be made in respect of them, more particularly 6 head of cattle and 1 horse already paid to defendant, with costs of suit.

Plaintiff alleged that he is the eldest son and heir of late Galela and defendant the eldest son and heir of late Zingela; that during his lifetime the late Galela entered into a customary union with Majombela as a result of which Qasheka was born; that after Galela's death Majombela, while living with her people, gave birth to the girls Qondani and Pangiwe in respect of whom no fines were paid; that plaintiff then paid three head of cattle as further dowry and Majombela returned to plaintiff's father's kraal with her three daughters and they grew up there; that plaintiff gave Qondani in marriage to one Boko by native custom but she deserted her husband before dowry was paid and went to live at Sigixana's kraal and that, while living there, she entered into a customary union with Mlungu who paid 6 head of cattle and one horse to defendant.

Defendant admitted that plaintiff's late father Galela entered into a customary union with Majombela as a result of which Qasheka was born. He pleaded, however, that after Galela's death his (defendant's) late father Zingela entered into a customary union with Majombela who was then a "dikazi" living with her people and paid 2 head of cattle and 2 horses as dowry and the girls Qondani and Pangiwe were born as a result of this union. He also pleaded that after the death of Zingela, Majombela returned to live with her people together with her children and while there Qondani and Pangiwe went to live at Plaintiff's kraal. He admitted that plaintiff gave Qondani in marriage to Boko by native custom and that Qondani deserted her husband and went to live at Sigixana's kraal. He also admitted that Qondani had entered into a customary union with Mlungu but pleaded that the dowry consisted of five head of cattle only and that he (defendant) is lawfully entitled to the said Qondani's dowry as well as that of the said Pangiwe as their guardian and heir. In the Chief's Court judgment was given for plaintiff that he is guardian and heir of Qasheka, Qondani and Pangiwe and as such their dowry-eater and for payment by defendant of five head of cattle or their value with costs of suit.

Defendant appealed to the Court of the Native Commissioner, Flagstaff and, after hearing evidence the Native Commissioner entered the following judgment: Plaintiff (respondent) declared to be entitled to dowry in respect of Qasheka, Qondani and Pangiwe, daughters of the late Majombela, in particular three head of cattle and £5 dowry paid to defendant (appellant) in respect of Qondani. Absolution from the instance in respect of balance of claim for dowry paid.

Defendant has appealed against the judgment on the following grounds:—

1. That the judgment was against the weight of evidence and probabilities and the plaintiff failed to discharge the onus on him of proving that he was entitled to the rights in the girls Qondani and Pangiwe.
2. That as the marriage of the late Zingela to the woman Manjombela was clearly proved the rights in the girls Qondani and Pangiwe vested in the defendant and judgment should have been entered for him accordingly.
3. That the Native Commissioner erred in entering judgment against defendant in respect of the girl Qasheka because neither in the Chief's Court nor in the Native Commissioner's Court did the defendant make any claim concerning her. Moreover it was agreed between the parties in the Native Commissioner's Court that the rights in Qasheka were not in issue.

Plaintiff has adduced evidence to the effect that after the death of Galela, he paid further dowry to Majombela's people in respect of the children born to her after her husband's death. This evidence has not been disputed and is supported by the admitted fact that the children in question left the kraal of their mother's people to live with plaintiff. It is unlikely that Majombela's people would have allowed them to do so if plaintiff had not paid the further dowry as stated by him. The onus was on defendant to prove that Majombela entered into a customary union with the late Zingela and that the girls Qondani and Pangiwe were born subsequently. The Native Commissioner states that there is no acceptable evidence that Zingela paid dowry to Kitshini and this Court finds no grounds on which it could be said that he came to a wrong conclusion. The evidence of defendant's witnesses is contradictory. Sigixana and Qondani deny matters which were admitted by defendant in his plea. Sigixana denies that Qondani lived at Plaintiff's kraal and she denies that she entered into a customary union with Boko. Defendant has not given any satisfactory explanation as to why he did not take steps previously to assert his claim in respect of the two girls. Mr. Stanford, who appears for defendant, submits that it is a common practice for natives to leave girls, to whose dowries they are entitled, to live with other people until they approach marriageable age. This may be the case but it does not explain why defendant left the girls with plaintiff after they had attained that age. He did not assert his rights when Qondani was given to Boko in marriage and only received the dowry paid by Mlungu when Sigixana handed it over to him. He admits that Pangiwe is married but has not ascertained what dowry was paid in respect of her nor taken action for its recovery.

The Native Commissioner included in his judgment rights in respect of the girl Qasheka. Defendant has never disputed plaintiff's claim in respect of this girl and plaintiff had no justification for submitting these claims for the Court's decision. We consider, however, that no prejudice has been caused to defendant as the inclusion of these claims has not involved any additional costs.

The appeal is dismissed with costs.

For Appellant: Mr. F. C. W. Stanford, Flagstaff.

For Respondent: Mr. C. Stanford, Lusikisiki.

CASE No. 25.

MPHUPHUMISI MBANGI *v.* **SAMNTSEBE MNOMBO.**

PORT ST. JOHNS: 30th September, 1948. Before Warner (Acting President), Grant and King, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Adultery—Damages—Assault—Blood stains—Practice and Procedure—Essential to prove assault—Claim for damages for assault refused.

Appeal from the Court of the Native Commissioner, Tabankulu.

Warner (Acting President) delivering the judgment of the Court:

Plaintiff claimed from defendant 3 head of cattle or their value £15 as damages for adultery, alleging that defendant had committed adultery with his (plaintiff's) wife Matekwini in the veld near the kraal of one Nofaile on or about 6th October, 1947.

Defendant denied the adultery and counterclaimed for £30 damages for assault alleging that on or about the 6th October, 1947, plaintiff had assaulted defendant, falsely alleging that he had caught the latter in adultery with his wife.

Plaintiff denied liability for the assault and stated that, when he caught defendant in adultery the latter had resisted and they had fought and he had then thrashed defendant with a stick.

After hearing evidence the Native Commissioner gave a judgment of absolution from the instance on the claim in convention and on the claim in reconvention for plaintiff in reconvention for the sum of £10 and costs.

Plaintiff has appealed against this judgment on the grounds that it is against the weight of evidence and the probabilities of the case. Defendant has cross-appealed on the grounds that the award of £10 as damages for assault was inadequate and insufficient and the attorneys had agreed that if the counterclaim succeeded the amount of damages should be fixed at £15.

The evidence of plaintiff and his witnesses is to the following effect: Plaintiff has two wives and two separate kraals. On a certain night in October, 1947, he attended a beer drink at which his wife Matekwini and defendant were present. He suspected their relations and pretended to leave for his other kraal but hid near the path which Matekwini would take. She passed in company with a woman Mahotela and plaintiff then returned to the kraal where he met Mcotshelwa. Plaintiff and Mcotshelwa ascertained that defendant was no longer at the beer-drink and proceeded along the path taken by the two women. When they had gone some distance they heard voices and going off the path they found Matekwini and defendant lying under one blanket. Plaintiff delivered a blow at defendant who got up and grappled with plaintiff and stabbed him with a stick over his right eye. Mcotshelwa assisted plaintiff and defendant was thrown to the ground. Matekwini ran away and Mcotshelwa chased her and brought her back. Defendant got up and ran away. Plaintiff chased him but he disappeared in a bush. Defendant left behind him his blanket, hat, shirt, trousers and belt. Plaintiff collected these articles and next morning went to defendant's kraal with Mcotshelwa, Matekwini, Mahotela and Nofaile but they did not see defendant. Subsequently plaintiff went to the charge office where he admitted that he had assaulted defendant and paid a fine of £4 on admission of guilt.

Defendant's version is that he left Nofaile's kraal alone and on the way he overtook the two women Matekwini and Mahotela and was conversing with them when plaintiff and Mcotshelwa came up and assaulted him. He states that he became dazed and does not know what happened until he found himself at the bottom of a krantz, naked.

The Native Commissioner has accepted the evidence of the two women that they waited for defendant at a prearranged spot. He does not give any reason why he should accept portion of their evidence and reject the rest. He appears to be under the impression that according to the evidence for plaintiff, there would have been insufficient time for defendant and the woman to have undressed and cohabited before plaintiff and Mcotshelwa arrived, as alleged by the witnesses, but natives are usually unreliable when giving evidence in regard to time and distance.

The Native Commissioner has, however, overlooked certain matters in regard to blood stains on the exhibits. These blood stains have an important bearing on the case. Defendant states that when he was assaulted he was fully dressed, that he received two open wounds on the head and bled profusely. The presence of blood stains on the exhibits would support his statement. Plaintiff stated that when he assaulted defendant the latter was naked. Plaintiff gave evidence at the first hearing and on producing the exhibits stated: "There are no blood marks on these exhibits ". This statement was not challenged and this Court must assume that it was correct. When the case was adjourned defendant was allowed to take the exhibits away. He gave evidence at the resumed hearing and stated: "The shirt and the hat had blood stains. I have not got the shirt and hat here today. There was blood inside my hat and stains of blood on the back of my shirt. My trousers and blanket had no blood stains." One can come to no other conclusion but that defendant was deliberately lying when he stated that the shirt and hat had blood stains in view of the fact that these articles were free of blood marks when produced previously by plaintiff in Court.

The Native Commissioner has not commented on the demeanour of the witnesses or given any reason why he has accepted the evidence given on behalf of defendant in preference to that given on behalf of plaintiff.

In our view the weight of the evidence and the probabilities of the case are on the side of plaintiff and these are supported by defendant's attempt to mislead the Court in regard to blood stains on the exhibits.

Defendant stated that he received two open wounds on his head as well as injuries to the body. He produced a statement from a medical practitioner but this does not mention injuries to the head. There is a possibility that, in escaping from plaintiff defendant did fall over a krantz and that he received injuries to his ribs when he fell. In any case, we are not satisfied that the force used was in excess of what was necessary for the occasion and we consider that defendant is not entitled to damages for assault.

The appeal is allowed with costs and the judgment of the Coust below is altered to read: Claim in convention: For plaintiff as prayed with costs. Claim in reconvention: For defendant in reconvention with costs.

The cross-appeal is dismissed with costs.

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. Birkett, Port St. Johns.

CASE No. 26.

NTULWANA SIPOLWANA *v.* **MSINTSILA SIGEM.**

PORT ST. JOHNS: 30th September, 1948. Before Warner (Acting President), Grant and King, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Damages for adultery and pregnancy—Practice and Procedure—Absolution should not be granted if prima facie *case made out.*

Appeal from the Court of the Native Commissioner, Ngqeleni.

Grant (Member) delivering the judgment of the Court:

The plaintiff (appellant) sued defendant for five head of cattle or their value £25 as damages for committing adultery with his wife Mamtasana and causing her pregnancy. At the close of plaintiff's case an absolution judgment was entered and an appeal has been noted on the following grounds:—

> That the presiding officer erred in granting absolution from the instance at close of plaintiff's case inasmuch as plaintiff has put forward a strong *prima facie* case against the defendant who should be put to the proof of his defence, and that the few discrepancies in evidence between plaintiff's wife and the woman Makeswa are not sufficient to justify the finding or judgment of absolution.

It is not denied that plaintiff's wife gave birth to a child about January, 1948, and it is clear from the evidence that, due to plaintiff's absence on the mines, he was not the father of this child.

Mamtasana (plaintiff's wife) states that defendant is the father of the child and that he first made love to her during hoeing season in 1947. She details the different occasions, eight in all, on which she cohabited with defendant, and a woman Makeza corroborates her in respect of five of these meetings, in some of which she acted as a go-between.

The Assistant Native Commissioner in his reasons enumerates certain discrepancies between the evidence of plaintiff's wife and that of Makeza. He states that he was not impressed with the demeanour of the former and that at times she was most evasive in answering questions. For these reasons he granted an absolution judgment at the close of plaintiff's case without hearing any evidence for the defence.

In Buckle & Jones (5th edition) at page 91 it is stated that "Absolution may be given where only one party has led evidence if there is not sufficient evidence upon which a jury *could* reasonably find for the claimant. If there is such evidence absolution should not be granted without hearing the other side even though there are a number of contradictions and discrepancies in plaintiff's case and should not exclude evidence from its consideration unless the witnesses have broken down or their evidence is palbably untrue."

The Assistant Native Commissioner admits that most of the discrepancies are of a minor nature but states that they could not be ignored as they were so numerous and cannot be put down to lapse of time.

Some of the discrepancies referred to relate to the period of time which lapsed between the various meetings between plaintiff's wife and defendant and as to whether the women arrived at the meeting places before or after the defendant. It must be borne in mind, however, that whereas the alleged meetings

took place during the early part of 1947, these witnesses only gave evidence on the 18th May, 1948, and that they are testifying to events which took place at least 12 months before, moreover, they are required to give details of five different meetings. It is not surprising, therefore, to find discrepancies after the elapse of so long a period.

In any case as pointed out previously, before an absolution judgment can be granted, the test is whether there is sufficient evidence upon which one *could* reasonably find for the plaintiff.

We are of opinion that in spite of the discrepancies enumerated by the Assistant Native Commissioner, there is sufficient evidence that the plaintiff has made out a prima facie case which it was incumbent upon the defendant to rebut.

The appeal is therefore allowed with costs, the judgment in the Court below set aside and the case returned for further hearing.

For Appellant: Mr. Stanford. Lusikisiki.

For Respondent: Mr. Birkett, Port St. Johns.

CASE No. 27.

SIKUNGATA MGOTYWA AND ANO *v.* **LUDIDI MAGADULE.**

PORT ST. JOHNS: 30th September, 1948. Before Warner (Acting President), Grant and King, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Return of wife failing which return of dowry—Practice and procedure—Consent judgment was only for return of wife —Issue of writ—Procedure in accordance with legal practice.

Appeal from the Court of the Native Commissioner, Port St. Johns.

Grant (Member) delivering the judgment of the Court:

The defendant in the present case issued a summons in the Native Commissioner's Court at Port St. Johns on the 28th November, 1947, for the return of his wife, failing which the restoration of his dowry and a consent judgment was entered by the Clerk of the Court on the 9th December, 1947. A writ was issued against the present plaintiff for the return of defendant's wife or five head of cattle or their value £25 and 1 horse or its value £20 and costs. The Deputy-Messenger attached 8 head of cattle and was in addition handed £10 by the plaintiff (the defendant in those proceedings).

Plaintiff thereafter sued to have the judgment and writ set aside and for an order permitting him to file a plea and defend the action on the following grounds:—

1. That he denies that he ever signed any consent to judgment, and denies further that he was present at any time when judgment was entered or granted against him.
2. That he has a good and valid defence to the action in that—
   (*a*) the wife was not deserting her husband nor refusing to return to him;
   (*b*) that there have been in fact three children of the marriage not two as alleged, and that a further beast should have been deducted on this ground;
   (*c*) that no allowance for wedding outfit has been made;
   (*d*) that a horse when paid as dowry counts merely as a beast or value £5 and not a value of £20.
3. That the consent judgment is irregular (if upheld by the Court) inasmuch as no period of time within which return of wife is to be effected failing which refund of dowry.

The Native Commissioner entered judgment for defendant with costs and the plaintiff has appealed on the following grounds:—

1. That the consent to judgment upon which consent judgment was entered in this instance is not such a full and complete consent to judgment as would justify the granting of the judgment as entered by the Clerk of the Court.

That on evidence of the Court Interpreter Dobe the only consent given by plaintiff (defendant in original action) was for return of Ludidi's wife, and that before the Clerk of the Court no mention was made of any cattle or horses or money value to be returned. That the judgment as entered on record is not entirely in terms of the alleged consent signed by the present plaintiff.

2. That the return of Ludidi's wife to the kraal of his family namely that of his elder brother a nearby kraal, even if not to his own actual kraal, was sufficient return of the woman, and a writ should not have been issued against him, present plaintiff, on behalf of Ludidi.
3. That generally the judgment is against the weight of evidence.
4. That present plaintiff has defence against the value placed upon the horse.
5. That in interests of justice his defence in full should be before the Court as circumstances shown in this Court in the evidence do not satisfy the Court that he had full and true knowledge of the claim against him and his rights of defence against such claim.

In argument before this Court Counsel for appellant confined argument to ground (1) of the notice of appeal particularly to the point that plaintiff only consented to the return of defendant's wife and he laid stress on the evidence of the Court Interpreter, Tylden Dobe, where this witness stated in cross-examination that "Kititamba (plaintiff) only consented to return of the woman".

It is clear from the evidence of Tylden Dobe, taken as a whole, that before plaintiff consented to judgment the summons was carefully explained to him and he was informed that should he not return, defendant's wife he would be required to return the dowry. This is also borne out by the subsequent conduct of the plaintiff when the Deputy-Messenger served a copy of the writ on him at his (plaintiff's) kraal. We accept the evidence of the Deputy that the plaintiff after consulting his relatives agreed to restore dowry and actually handed two head of cattle and £10 in cash and thereafter he was instrumental in delivering the remaining 6 head of cattle making 8 head in all, which were placed under attachment.

The original summons in which plaintiff was defendant bears his signature by way of a mark that he consented to judgment and a heavy onus is therefore placed on him to prove that such consent was made by mistake. He denies that he ever touched the pen but one of his witnesses says that he did. They all deny that they were taken to the office of the Clerk of the Court, but there is no reason to disbelieve the evidence on this point by the Court Interpreter Dobe.

We are satisfied that the plaintiff did consent to judgment and that he well knew that if the defendant's wife was not returned he would be required to refund the dowry. The woman has not gone back to her husband's kraal and the issue of the writ is therefore in order. The appeal is accordingly dismissed with costs.

For Appellant: Mr. C. Stanford.

For Respondent: Mr. Birkett.

CASE No. 28.

JOHN LEPHAPHANG *v.* **BLOW JWILI.**

KOKSTAD: 6th October, 1948. Before Warner (Acting President), Wakeford and Cockcroft, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction—Agreement to pay specified fine—Written acknowledgment of debt—Duress—Proof of essential—Damages—Father has legal right to claim.

Appeal from the Court of the Native Commissioner, Mount Fletcher.

Warner (Acting President) delivering the judgment of the Court:

Plaintiff claimed from defendant three head of cattle plus £3. 10s., £4 10s. and £5 the value of three further head of cattle, basing his claim on an agreement signed by defendant on the 16th June, 1947, to pay these cattle and moneys in respect of his having seduced and rendered pregnant plaintiff's daughter Amelia.

With the leave of the Court, this claim was amended during the hearing by fixing the alternative value of three cattle claimed at £5 each.

In his plea defendant denied seducing and rendering Amelia pregnant and pleaded that the agreement was signed by him under duress, fear, pressure and threats of violence and force and was invalid and unenforceable.

An additional plea was filed by consent, during the hearing to the effect that the consideration in respect of which the promissory note or acknowledgment of debt was given was illegal, immoral and contrary to public policy and was therefore invalid and legally unenforceable.

A judgment of absolution from the instance was given and an appeal has been noted on the following grounds:—

The judgment was wrong in law, and should have been one in favour of the plaintiff, in that, apart from the documentary evidence adduced in the action, there was other evidence adduced on behalf of the plaintiff which established:—

(*a*) That defendant had had carnal intercourse with plaintiff's daughter, Amelia.

(*b*) That when the defendant admitted in his evidence he had had carnal intercourse with Amelia he stated this took place in April, 1947.

(*c*) That Amelia contradicted this allegation as to TIME by alleging the intercourse took place in January, 1947, and that she as the result thereof, got pregnant in February, 1947, and gave birth to a child on 3rd November, 1947.

(*d*) That in law, the evidence of Amelia should have been preferred to that of the defendant, on the question of time of seduction and pregnancy.

(*e*) That judgment should thus have been given in favour of the plaintiff for damages.

That the judgment was against the weight of evidence in that:—

1. That the document filed in the action signed by defendant in June, 1947, wherein he admitted the liability for the pregnant condition of Amelia, coupled with the other evidence in the action adduced, conclusively proved plaintiff's case for damages against the defendant.

2. That defendant attempted to prove that the document filed in—

   (*a*) this action was obtained from him by fear, threats of violence and under duress, but failed so to do;

   (*b*) that as the onus in law was upon the defendant to prove this allegation in 2 (*a*) herein-above, and that he failed so to do, and that a final judgment for damages should thus have been given against him, and not a judgment of ABSOLUTION, as was done.

Plaintiff stated in evidence that he found that his daughter was pregnant; that he sent messengers to defendant, that he received a message that he should attend at the house of defendant's brother; that he went there with others and found defendant with his brother James Jwili and Lupindo; that he asked why he had been sent for and Lupindo stated that they desired to discuss the matter among themselves before replying to him; that he became angry and demanded why they had not had their discussion before sending for him; that defendant then admitted that he was responsible for Amelia's pregnancy and agreed to pay three head of cattle and £13. 10s. representing another three head as demanded by plaintiff; that at his request a document was drawn up by one Moleko and signed by defendant and by all present as witnesses. He handed in the document a translation of which is in the following terms:—

Payment of John Lephaphang's child is six (6) head of cattle, three (3) horned cattle, three with money. One at three (£3. 10s.) pounds ten shillings. the other four (£4. 10s.) pounds ten shillings and another five (£5) pounds.

At the end of this month I will pay five (£5) pounds. I sign here being the one who did this.

"Sgd." B. Jwili.

Witnesses: (1) "Sgd." J. Moleko, (2) E. Lupindo, (3) P. L. Koloko, 4) P. Blofo, (5) J. Jwili

Plaintiff denied that any threats were used when the document was signed. He stated Amelia gave birth to a full time child on 3rd November, 1947, and admitted that she had had a previous child by another man in December, 1945.

Plaintiff is supported by Petrus Bolofo, Court Interpreter, who states that defendant signed the document freely and voluntarily.

Defendant admitted that he had had intercourse with Amelia on three occasions but stated that the first occasion was on 8th April, 1947, so that he could not have caused her pregnancy. He also stated that he received a message that plaintiff was claiming damages; that he and others assembled to discuss the matter; that before they could commence their discussion, plaintiff arrived; that they informed him that they had not yet discussed the matter; that they requested him to withdraw but he refused; that they then suggested that they should go out leaving plaintiff in the room; that plaintiff stood against the door and would not allow them to leave; that plaintiff pointed his finger at defendant saying "This is the day, I am going to stab you"; that he pointed with his left hand keeping his right hand in his pocket and defendant suspected that he had a knife in it; that defendant was in fear of his life and admitted having had intercourse with plaintiff's daughter and acknowledged liability in writing.

He is supported by Edward Lupindo who stated that plaintiff said that he would kill defendant but could not remember whether he said how he would do so.

As plaintiff has brought his claim on a written acknowledgment of debt, it is unnecessary for this Court to decide whether he was entitled to the amount of damages claimed by him.

Defendant signed an acknowledgment of debt for a specific number of cattle and sums of money, and unless he can show that he did so under duress, he is legally liable on the document. The onus of proving the duress rests on him. As was pointed out in the case of Dyoldani *v.* Xesu, 1941 N.A.C. (C. & O.) 72, the absence of free consent will not be lightly presumed nor will restitution be granted unless the threatened force or violence is of such a serious nature as to be calculated to affect and instil fear into a person of ordinary constancy and firmness of mind for there is no excuse for groundless or foolish fear.

When defendant signed the acknowledgment of debt a brother and a friend, both native constables, were present. He states that plaintiff threatened to stab him but does not allege that any weapons were produced. He states that plaintiff brought others with him but does not allege that they assisted plaintiff in intimidating him.

We consider that defendant has failed to discharge the onus of showing that when he signed the acknowledgment of debt, he did so under duress.

The defence has also been raised that as this action is based on acknowledgment of debt, it must be tried under the Common Law, that as it is illegal, immoral and contrary to public policy, in terms of Common Law for a father to claim damages in respect of his daughter's pregnancy the claim is unenforceable.

The parties are natives and under Native custom, a father has a legal right to claim damages in respect of the pregnancy of his daughter. In our opinion, this action is not vitiated by the fact that plaintiff obtained an acknowledgment in writing and chose to sue on this acknowledgment rather on the wrong itself.

The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiff as prayed with costs.

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

CASE No. 29.

MATANDA ZIBONDA *v.* **MIKA JAMANDLINI.**

KOKSTAD: 7th October, 1948. Before Warner (Acting President), Wakeford and Cockcroft, Members of the Court (Southern Division).

Native Appeal Case—Native custom—Dowry—Special agreement must be proved—Negotiator must be present when dowry is fixed—Killing of sheep means transaction has been completed—No further dowry payable.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Cockcroft (Member) delivering the judgment of the Court:

Plaintiff (respondent) claimed from defendant (appellant) ten head of cattle or their value at £5 each, with costs of suit, being the balance of dowry for his aunt Ellen, alleging that a dowry of 20 head of cattle was agreed upon.

Defendant denies that the amount of dowry was fixed and agreed upon.

It is common cause that dowry totalling ten head of cattle has already been paid by defendant for Ellen.

The Assistant Native Commissioner gave judgment for plaintiff, as prayed, with costs, and defendant has appealed against the entire judgment on the ground that the judgment was against the weight of evidence and against the probabilities.

In his reasons for judgment the Assistant Native Commissioner states that both parties gave their evidence in a straight forward way, and found as a fact that a meeting was held between the two parties and the amount of dowry was fixed and agreed upon.

As plaintiff alleges a special agreement to pay a fixed dowry, the onus rests heavily upon him to prove the special agreement, and counsel for respondent accepted this position.

Plaintiff in his evidence states that defendant was sent for to appear at plaintiff's kraal for the purpose of being accepted as a son-in-law, a sheep was killed, and defendant agreed to the dowry of 20 head, saying he did not have the cattle and was going out to work.

Under cross-examination he stated that Ellen had had no children prior to her marriage and was not a dikazi and admitted that Swencana, who had acted as go-between for defendant and was present at all the other negotiations, was not present when defendant agreed to pay the additional dowry. He does not remember the year the dowry was fixed.

Plaintiff's great uncle Zimantji Vuyisana states he was present at plaintiff's kraal when defendant was sent for to be told what dowry had to be paid. He told defendant that he had to pay a further ten head of cattle before he could arrange a marriage ceremony and that "defendant replied he heard but that he did not have cattle then . . .".

Under cross-examination he admitted that Ellen had one child before she got married and that she was a dikazi. This fixing of the dowry took place during the war.

Another great uncle of plaintiff Sikutsha Pilimane, states that he was also present at Ellen's dowry talk. He does not know how long ago it was, but states it may be 8 years ago. He states defendant when told by the previous witness that he had to pay 20 head of cattle, "agreed and said we must give him time and we will hear later from him".

Under cross-examination, he also admitted that Ellen had a child prior to her marriage to defendant, and that Swencana, who had acted as defendant's negotiator, was not present at the meeting, being away at work at Creighton.

Both his two witnesses discredit plaintiff in regard to the question of Ellen being a dikazi.

Defendant's evidence is to the effect that he rendered Ellen, then a dikazi, pregnant, and she had her first child by him in 1940. After he had rendered her pregnant he paid 10 head of cattle as dowry. He denies that the dowry was ever fixed, and maintains that no beast could be slaughtered in the absence of his negotiator.

Swencana Msingapantsi states that he was defendant's negotiator and delivered the ten head of cattle. The amount of dowry was not agreed upon. He works near the village of Creighton, in Natal, which is not far from the Dumakude Location in which the parties reside, and he maintains that if the dowry had been fixed he should have been called, and that it would be contrary to custom to fix the dowry in his absence, being defendant's negotiator.

Certain questions were put to the Native Assessors, and these, together with the replies given, are appended as an annexure to this judgment.

The record does not disclose the tribes to which the parties belong, and in this connection we cannot stress too strongly the necessity for a judicial officer, when hearing a case under native custom in a district in which there are different tribes, observing different customs, to elicit and record this information.

The form of this action suggests that the parties did not belong either to any of those tribes which have a fixed dowry or to those tribes which practise the custom of teleka, hence the form of the questions put to the Native Assessors.

The Assessors opinion is considered a reasonable exposition of the customs of those tribes which have not a fixed dowry and which do not practise teleka.

In this case the evidence for plaintiff is to the effect that the dowry was agreed upon some years after defendant had been living with the woman Ellen and he had had three children by her, and defendant's negotiator Swencana was admittedly not present at the meeting when it is alleged that the additional dowry to be paid was agreed upon.

In view of the statement of custom given by the Assessor, we consider there is a grave doubt as to whether defendant did agree to pay a further ten head of cattle as dowry and plaintiff has failed to discharge the onus of proving the special agreement.

The appeal is accordingly allowed with costs, and the judgment of the Court below is altered to one of absolution from the instance with costs.

Assessor's Opinion.

[Names of Assessors: Bishop Ntlabati (Umzimkulu), Chief Khorong Lebenya (Mount Fletcher), Frank Nkomo (Mount Frere), Doda Sipika (Matatiele) and Nkali Masepe (Matatiele).]

Question: Among the tribes which do not have a fixed dowry and do not observe the *teleka* custom, at what stage is the amount of dowry fixed?

Answer per Bishop Ntlabati: Dowry is fixed on the day when the girl is taken to her husband's kraal.

Question: Is it customary among such tribes for the bridegroom himself to negotiate a marriage and agree to the amount of dowry to be paid?

Answer (per Bishop Ntlabati): It is not customary for the bridegroom to negotiate. It is customary for someone to negotiate on his behalf.

Question: If a negotiator has acted for the bridegroom in negotiating the marriage is it customary for the bridegroom to agree to the amount of dowry to be paid in the absence of his negotiator?

Answer (per Bishop Ntlabati): The negotiator should be present when the amount of dowry is fixed.

Question (per Mr. Zietsman): If a man makes a woman pregnant and tells her people that he wants to marry her and sends messengers and pays 10 head of cattle and a sheep is killed, is it not customary for the father of the girl to demand a further 10 head of cattle or should this be done before the sheep is killed?

Answer (per Bishop Ntlabati): The further 10 head of cattle should be demanded before the sheep is slaughtered. It is not customary to demand a further 10 head on the day that the sheep is killed. The killing of the sheep signifies that agreement has been reached and dowry has been fixed.

NOTE.—The replies were given by Bishop Ntlabati. The other assessors stating that they have no knowledge of the customs mentioned.

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

CASE No. 30.

MALFAAN PAKKIES *v.* SKIBINYANA FANYANA.

KOKSTAD: 7th October, 1948. Before Warner (Acting President), Wakeford and Cockcroft, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction—Timeous report must be given—Basuto custom.

Appeal from the Court of the Native Commissioner, Matatiele.

Wakeford (Member) delivering the judgment of the Court:

Plaintiff obtained a judgment aganist defendant for six head of cattle or their value £30 and costs of suit in an action for damages for the seduction and pregnancy

of his daughter, Harriet, a minor. Defendant has appealed against this judgment on the grounds that it is (1) against the weight of evidence and (2) bad in law in that a timeous report was not made to defendant as required by Basuto custom.

The parties are Basutos and at the time material to this action were living on the farm Richmond in the District of Matatiele.

Defendant is a married man and Harriet's story is that he made advances to her and that in December, 1946 (when his wife was with her people following her confinement) she, on his invitation, visited him at his hut where she was seduced. Afterwards she and defendant met on many occasions usually at night. These meetings were clandestine but on two occasions, once at night and once on a Sunday afternoon, they were observed by one Mahlomela. Defendant's wife's return did not stop their meetings and their intimacy continued for some months until Harriet left the farm with her people who moved to Sibi's location. Harriet missed her periods in February, 1947. She told defendant, who persuaded her not to tell her people. The latter did not become aware of the pregnancy until this was revealed at an examination made by the women of the kraal during reaping season (July, 1947).

Plaintiff states that as soon as he became aware of Harriet's condition he sent messengers to defendant and his father. Messengers were sent on three occasions and two meetings were held, the second taking place on 2nd August, 1947. That meetings in this connection were held is common cause.

Defendant denies that he was ever intimate with Harriet and that she reported her condition to him.

There are discrepancies between the statements made by Harriet and Mahlomela as to the occasions on which the latter observed Harriet in the company of defendant, but these have been dealt with by the judicial officer in his reasons for judgment and this Court considers that no good reason has been shown why it should differ from him in his evaluation of Harriet's story and the corroboration given it by Mahlomela. There is, in the opinion of this Court, sufficient evidence to justify the judicial officer's finding that defendant was the author of Harriet's pregnancy.

It is true that Harriet hid her pregnancy from her family, but the record shows that her father, the plaintiff, took the necessary steps as soon as he became aware of her condition. Defendant avers that the summonses he received did not sufficiently acquaint him with the charge preferred against him, but there is ample evidence to show that the charge against him was clearly set out at the meetings, and one of his witnesses goes so far as to say "The main point at issue . . . . as far as the defendant was concerned was whether the girl was pregnant or not and not the seduction." This Court is satisfied that plaintiff, once he became aware of Harriet's condition, acted with due despatch.

The appeal is dismissed with costs.

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

CASE No. 31.

MOHAU MAKORO AND ANO. *v.* **LEKHOASA SEEMANE.**

KOKSTAD: 8th October, 1948. Before Warner (Acting President), Wakeford and Cockcroft, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Kraalhead responsibility—Torts committed by an inmate—Damages for seduction and pregnancy—Basuto Custom.

Appeal from the Court of the Native Commissioner, Mount Fletcher.

Warner (Acting President) delivering the judgment of the Court:

Plaintiffs claimed from defendant five head of cattle or their value at £5 each being damages suffered by plaintiff as result of defendant No. 1 having seduced and rendered pregnant plaintiff's daughter.

In the particulars of claim it was stated that defendant No. 1 is the adopted son and/or an inmate of the kraal of defendant No. 2 who is the kraalhead of defendant No. 1 and as such is liable jointly and severally with defendant No. 1 for his torts and for plaintiff's claim in this action according to native law and custom.

First defendant admitted that he had seduced plaintiff's daughter and caused her pregnancy. He consented to judgment but second defendant denied that first defendant is his adopted son or an inmate of his kraal and that he is not responsible for the torts of first defendant. The point in issue is thus the liability of second defendant as kraalhead.

After hearing evidence the Assistant Native Commissioner gave judgment against defendant No. 2 for five head of cattle or their alternative value at £5 each jointly and severally with defendant No. 1, the one paying the other to be absolved, and costs of suit.

Second defendant has appealed against this judgment on the following grounds:—

(1) That the judgment is bad in law, in as much as defendant No. 2 not being the natural father of defendant No. 1 and not being in receipt of his earnings, he cannot under Basuto custom be held responsible for the torts of defendant No. 1.

(2) That the judgment is against the weight of evidence.

Second defendant states that first defendant came to his kraal when he was six or seven years old and that his father is Temba who is alive and lives in Basutoland. Temba's wife and second defendant's wife being sisters. He states that he engaged first defendant as a servant and paid him six goats a year. Under cross-examination he admitted that since first defendant first came to him he had lived at his kraal until the present time, except for occasions when he has been away to work. He also admits that he treated first defendant as his own child and arranged his circumcision when he provided a beast to be slaughtered. He states that he paid him goats as wages, but admits that first defendant did not take these goats away from the kraal. He also states that when the pregnancy was brought to him he replied that he was not the natural father of first defendant and that he repudiated liability; that he fetched Temba (the father of first defendant) and took him to plaintiff's kraal.

First defendant gave evidence on behalf of plaintiff and stated that he lives at the kraal of second defendant where he is maintained as an ordinary son. He states that in 1944 Temba came and claimed him as his child, and wanted to take him away but second defendant objected and he remained at the latter's kraal. He also states that he was registered for taxes under second defendant's surname on a note given to him by second defendant who also provided the money for the 1st payment. Second defendant, however, denies that he arranged for first defendant's registration as a taxpayer or that he assisted him to pay. First defendant admits that he received goats from second defendant but says that they were not paid to him as wages but were given to him as a present.

Plaintiff states that when the pregnancy was reported to second defendant he agreed to pay but subsequently stated that first defendant was not his son. He also states that he knows first defendant to be the natural child of second defendant and that he has never spoken about this matter to Temba nor has he ever seen him.

In the case of William Matseoa *v.* Stanford Qungane, heard in this Court at Kokstad on the 8th June, 1948, it was decided that a kraalhead is responsible for the torts of all the inmates of his kraal whether they are related to the head or not.

At the request of counsel for appellant questions were put to the Native Assessors and their replies are attached. They indicate that a kraalhead is liable for the torts of all inmates of his kraal, whether they are related to him or not, but if a tort is committed by an inmate who is not his son he may transfer his liability to the tort-feasors' natural father by bringing the latter into contact with the claimant.

It is common cause that first defendant has been an inmate of second defendant's kraal for many years and in view of the decision quoted above, to which we adhere, the onus is on second defendant to show that he is not responsible for the torts of the first defendant. He has failed to discharge this onus and the appeal is dismissed with costs.

Native Assessors Opinions.

[*Names of Assessors:* Bishop Ntlabati (Umzimkulu), Khorong Lebenya (Mount Fletcher), Frank Nkomo (Mount Frere), Doda Sipika (Matatiele) and Nkali Masepe (Matatiele).]

The facts of the case are put to the Assessors and they are asked to state the Basuto custom.

Khorong Lebenya (*Basuto*): If a young man while living at the kraal of someone other than his natural father seduces a girl and the kraalhead does not report the seduction to the natural father of the young man he (the kraalhead) is liable for the tort. If the young man went to work and gave his earnings to the kraalhead the latter would be responsible. The kraalhead in person must report to the natural father. It is not sufficient to send the tort-feasor to do so.

Doda Sipika (*Hlubi*): If the young man came to the kraal at the request of his natural father the latter would be responsible if a report was made to him. If the kraalhead gave the young man his surname that makes him his own son and he is responsible for the young man's torts.

Nkali Masepe (*Basuto*): I agree.

Bishop Ntlabati (*Hlangwini*): Under Hlangwini custom the natural father is responsible; but if kraalhead does not report to the natural father the kraalhead will be responsible.

Frank Nkomo (*Baca*): The Baca custom is the same as the Basuto custom.

Khorong Lebenya (*per Mr. Zietsman*): The girl's father goes to the kraalhead who must take him to the natural father of the young man. Until the kraalhead does so he is liable. The kraalhead may also relieve himself of liability by fetching the natural father and taking him to the girl's father.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Walker, Kokstad.

CASE No. 32.

KWENKWE MROLO *v.* **MADLUMELA BOKLENI.**

UMTATA: 21st October, 1948. Before Cornell (Acting President), Midgley and Blakeway, Members of the Court (Southern Division).

Native Appeal Case—Marriage by Native Custom—Rejection of wife by husband —Dowry—Return of wife or return of dowry—Payment of beast to dissolve marriage.

Appeal from the Court of the Native Commissioner, Tsolo.

Cornell (Acting President) delivering the judgment of the Court:

Plaintiff sued defendant for the return of his wife or 7 head of cattle, 10 sheep and 2 horses or their value £60 with costs, setting out in his summons:—

1. That plaintiff is married to Madlamini according to Native Law and Custom and paid 12 head of cattle, 10 sheep and 2 horses as dowry.
2. That defendant is the brother and guardian of the said Madlamini.
3. That there are 5 children born of the said marriage.
4. That the said Madlamini has now rejected plaintiff.

Defendant in reply pleads as follows:—

1. Defendant admits paras. 1 and 3 of plaintiff's claim.
2. In regard to paragraph 2 defendant admits plaintiff married Madlamini and states that 5 head of cattle, 10 sheep and 1 horse were paid as dowry and puts plaintiff to the proof of the payment of any further dowry.
3. Defendant states that the said Madlamini bore 6 children and that at the time of the marriage there was a wedding outfit.
4. Defendant denies that Madlamini deserted plaintiff and says that about 9 years ago plaintiff severely assaulted the said Madlamini and drove her from his kraal. That since that date he has never attempted to "putuma" her and thus it was clear that plaintiff had rejected the said Madlamini.
5. Defendant states that in the event of plaintiff's action being held not sufficient to amount to a rejection of the said Madlamini then plaintiff is only entitled to one beast to mark the dissolution of the marriage.

The judgment of the Court below was for plaintiff for the return of 6 head of cattle, 10 sheep and 1 horse or their value £45 with costs and against this judgment defendant has appealed on the grounds:—

1. That appellant's allegation that his sister Madlamini, plaintiff's wife, was assaulted and rejected by plaintiff some 10 years ago is strongly corroborated by the fact that plaintiff failed to produce evidence that he during this period, while she was at appellant's kraal, attempted to "putuma" her or took any steps whatsoever to obtain her return to him.
2. That the onus of proving payment and delivery of dowry is upon the plaintiff whose evidence of such payment and delivery of stock over and above that admitted by appellant is uncorroborated, contradictory, unsatisfactory and wholly contrary to custom consequent on the payment of dowry.
3. That the judgment is not in accordance with plaintiff's prayer in his summons, that it is against the weight of evidence, proved facts and probabilities of the case. That the alternative value placed on the stock is excessive and contrary to the customary value of dowry stock.

Plaintiff married the woman Madlamini by Native Custom before 1931 and he admits that she left his kraal ten years before this action was heard. Fourteen head of cattle were alleged to have been demanded as dowry and 12 cattle, 10 sheep and 2 horses are claimed by plaintiff to have been paid. When the woman left plaintiff's kraal she had borne 3 children and during the time she has been away from his kraal it is clear that she bore another 3 children of whom plaintiff is not the father.

It is common cause that 5 head of cattle, 10 sheep and a horse were delivered as dowry to the late Mrolo, defendant's father. It is asserted by plaintiff that a further horse was delivered, the first being considered too small. Plaintiff does not say who drove the second horse but his brother Ntsizi Benson claims to be one of those who drove the second horse. Defendant admits the receipt of only one horse and the proof tendered of the payment of the second horse is so flimsy that it cannot be accepted.

At the time of payment of dowry defendant was a herd boy and would thus know very little, if anything, himself of the dowry matters. Now plaintiff claims that a further 7 head were paid. Three of these were delivered to the kraal of Nobala Luvulweni while four, which came from Mbobeleni's kraal were alleged to have been delivered at Ntsizi Benson's kraal. Plaintiff himself is unable to give direct testimony regarding these seven cattle, but he does say "When defendant's father came for dowry there were five head of cattle. It is unusual for a man to collect dowry for his own daughter. On that day he drove away the five head of cattle in company of another man. There is no one alive now who drove the cattle. On this same day the 3 head at Ngqeleni (at Nobala Luvulweni's kraal) were paid. I did not go to Ngqeleni same day but later when they came again. Mrolo, the father, Konose and myself went to Ngqeleni. Konose is also now dead."

From this excerpt it is clear that any independent persons able to testify as to the delivery of these three cattle are no longer available. Plaintiff's witness Nobala however testifies to the late Mrolo coming to his kraal and removing the cattle to be sold in Umtata while Ntsizi Benson gives similar testimony relating to the fate of the cattle from Mbobeleni's kraal. Plaintiff does not indicate how delivery of the four cattle from Mbobeleni's kraal was made to Mrolo but Ntsizi Benson states that Mrolo removed and sold these cattle.

It has been frequently laid down that the passing of cattle is an essential feature of a Native customary union. In Qokoyi Mbanga *v.* Bakaqana Sikolabe, 1939 N.A.C. (C. & O.) 31, McLoughlin, P., says "It must thus be established that the cattle which passed, passed as dowry." All the decisions consulted refer to delivery of cattle as an essential. In the case of an ordinary contract of purchase and sale clear evidence of delivery is necessary to pass ownership in the thing sold. As clear evidence is necessary to pass ownership in cattle alleged to have been paid as dowry. The evidence tendered by plaintiff and his witnesses is of facts so unorthodox in relation to the payment of dowry as to arouse in themselves strong suspicions of their credibility and thus strong corroboration is required. It the absence of any corroboration of the alleged acts of ownership

stated to have been exercised by Mrolo, i.e. his disposal of these cattle, of the usual customary formalities attendant on the payment of dowry and in the face of defendant's positive denial coupled with the fact that plaintiff did not institute action until after the death of the principal, the late Mrolo, this Court is satisfied that plaintiff has failed to prove the payment of the seven head as alleged. The payment of 5 cattle, 10 sheep and 1 horse is accepted as having been made.

Plaintiff's wife asserts in evidence that she was assaulted severely by plaintiff in consequence of which she left plaintiff's kraal and that by virtue of such assault and plaintiff's failure to putuma her, he, plaintiff, rejected her. Plaintiff however says he did putuma her and that she refused to disclose to him the names of the fathers of her three illegitimate children. Madlamini's claim that she was assaulted and rejected by plaintiff is quite uncorroborated by the woman herself who says in evidence "I don't have to answer to my husband for my illegitimate children because he allowed me to go out with another man. I am not prepared to disclose any names of the men to my husband. He does not have to know who the fathers are." Plaintiff has said in this respect "After I got well I went to fetch the woman. My wife would not give me any information." It is clear from this that plaintiff made an effort to putuma his wife but even if he did not his failure so to do is not a rejection of the woman. [Sehono Bobotyane *v.* Umgono Jack, 1944 N.A.C. (C. & O.) 9.] Her refusal to disclose the names of her paramours is a rejection. [Alfred Pame *v.* Solomon Gwele, 1941 N.A.C. (C. & O.) 3.] And plaintiff is thus entitled to the return of the cattle paid less one beast for each child born.

Plaintiff sued for the return of his wife or the return of his dowry. Although the woman rejected plaintiff, no authority can be found empowering a Court to dissolve the union forthwith. A prayer for the return of a woman requires an order for the woman's return to be made before ordering the return of the dowry stock in dissolution of the union.

The appeal herein is allowed with costs and the judgment of the Assistant Native Commissioner is altered to read "For plaintiff for the return to him within one month of his wife Madlamini, failing which the payment to him of one beast or its value £5 to dissolve the union with costs." The assertion of a marriage outfit provided has not been proved and no allowance is made therefor. It is clear that defendant to dissolve the union is thus required to return one beast and the award of one beast to dissolve the union is not a token award as pleaded by defendant but is an award of an actual beast due from the dowry paid.

For Appellant: Mr. Mugglestone, Umtata.

For Respondent: Mr. Hughes, Umtata.

CASE No. 33.

SIXAKI NOBANGULA *v.* NYAKOMBI NONKOBE.

UMTATA: 22nd October, 1948. Before Cornell (Acting President), Midgley and Blakeway, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Isewehula beast—Custom not practised amongst Tembu and Pondimise tribes—Practice and Procedure—Grounds of appeal to be concise—Spoliation action—Action lie under Native Custom.

Appeal from the Court of the Native Commissioner, Qumbu.

Cornell (Acting President) delivering the judgment of the Court:

In this matter plaintiff claims from defendant the sum of £15 being the value of a certain black and white ox and costs. In his particulars of claim plaintiff avers:—

1. That the parties hereto are natives.
2. That on or about the 4th January, 1948, certain women including the defendant's wife came to the kraal of plaintiff demanding an *isihaula* beast alleging that one Mangwana had seduced defendant's daughter. That plaintiff referred such women to Nyakatisa with whom the said Mangwana lived.

3. That thereafter the defendant wrongfully and unlawfully took or caused to be taken without the knowledge and consent of plaintiff from the grazing ground a certain black and white ox, his property, which said ox the defendant slaughtered and sent the spleen to Headman Matiwana alleging that he had slaughtered ox by the reason of the seduction of his daughter by Mangwana.
4. That plaintiff is not liable for the torts of the said Mangwana.
5. Plaintiff values the ox killed at the sum of £15.

To this defendant has pleaded as follows:—

1. Defendant states that Mangwana is the nephew of plaintiff and at the time of the gcagcaing of defendant's daughter and her seduction he was an inmate of the plaintiff's kraal.
2. Defendant denies that he took the beast from the plaintiff's kraal or that he caused same to be taken or that he slaughtered same or reported that he had slaughtered it; defendant states that he was away from the kraal when the beast was taken and had no knowledge that the beast was to be taken until same had been slaughtered.
3. Defendant further states that his wife after demand from plaintiff of the "isehewula" beast and after report to plaintiff's headman and after admission by Mangwana of the seduction, acting fully in accordance of Native Law and Custom accompanied by other women went and took the "isehewula" beast. That the taking of this beast and its method of taking was in accordance of Native Custom that defendant's wife did not commit any tort under Native Custom by the taking aforesaid. That further defendant is not liable for torts committed by inmates of his kraal which are torts under Native Custom. That he is not liable for the action of his wife for her act of spoliation under Common Law and she should be sued therefore in her personal capacity assisted by him. Defendant further states that the ox is the property of Mangwana who does not object to its being killed.
4. Defendant further states that in the circumstances plaintiff is liable to him for a seduction beast or its value £5 and in the event and the event only of the Court holding that defendant is liable in his personal capacity for the refund of the isehewula beast's value then defendant prays that the value of the seduction beast be deducted therefrom. Defendant denies that the value of £15 placed by plaintiff on the beast slaughtered is correct and puts him to the proof thereof.

After an application for a decision on the legal issue that "the 'isehewula' is a custom well recognised in Native Law and should therefore an animal be taken under this custom there is no tort in Native Law and a kraalhead will not be liable as such, but that value of beast will only be recoverable under Common Law in which event the tort-feasor, the woman herself, must be sued duly assisted by her husband (defendant)" was refused, the matter proceeded to trial at the conclusion of which judgment was given for plaintiff for £10 with costs.

An appeal was lodged on the following grounds:—

1. That in his summons plaintiff alleges that defendant "wrongfully and unlawfully took or caused to be taken . . . a certain black and white ox, the property of plaintiff". That in order that plaintiff could succeed it was necessary for him to prove this averment. That on the evidence adduced by the plaintiff and the defence it was indisputable that defendant "did not take or cause the beast to be taken". That it is submitted that the Judicial Officer erred in his finding that defendant's liability flowed by virtue of his position as husband and kraalhead of his wife, the actual spoliator.
2. That the Judicial Officer erred in finding as a fact that Mangwana did not live at plaintiff's kraal; that this finding was against the weight of evidence and probabilities of the case; that it was most unlikely that the woman who lived in an adjoining location would have gone. according to custom, to any other kraal but that in which Mangwana lived. That if Mangwana lived at plaintiff's kraal, then defendant's wife acting as she did acted, fully in accordance with Native Custom in the taking of the "isehewula" beast and thus committed no tort known to Native Custom. That secondly that if Mangwana lived at a

kraal other than that of plaintiff at the time of the seduction, then defendant's wife although purporting to act under Native Custom, acted irregularly because Native Law only allows the "isehewula" beast to be taken from the seducer or where an inmate from the kraal from the kraalhead. That in this event defendant's wife would be guilty of an act of spoliation.

3. That in the former event above defendant's wife committed no tort known to Native Custom and although the beast is recoverable under Common Law it is only recoverable as such and ONLY from the person who committed such act of spoliation or such persons who became parties to the spoliation. The defendant's liability as kraalhead for the torts of an inmate while resident there, is confined to torts under Native Custom and no kraalhead is liable for the torts of an inmate under Common Law.

4. That in the event of the Honourable Court finding that in fact the said Mangwana was not living at plaintiff's kraal at the time of the seduction and that therefore the action of defendant's wife constituted an act of spoliation, then it is submitted that plaintiff's action was brought under the Common Law. That all actions of spoliation are brought under Common Law. That in this event plaintiff could only sue defendant's wife, the principal tort-feasor, for recovery and in the light of all authority she would have had no defence thereto. That in any event a kraalhead could not be sued alone in respect of torts committed by inmates of his kraal and can at most only be joined as a co-defendant with the principal tort-feasor. That in this final conclusion plaintiff's action is bad in law as against defendant sued alone.

An additional ground reading:—

5. That on the evidence adduced the beast alleged to be spoliated is a progeny of a cow which belonged to the late Nonkobe and must, therefore, in the absence of satisfactory evidence to the contrary, be held to be the property of Mangwana who is the heir to the late Nonkobe. That this being the case, plaintiff has failed to prove that the beast was his property and he has no right to sue for its value;

was admitted when the matter was heard in this Court.

It is in place here to bring to notice again the dictum of the learned President of this Court in the case of Molatu Ponya *v.* Kikitla Sitate, 1944 N.A.C. (C. & O.) 13. In that case McLoughlin, P., says: "The grounds of appeal against the Native Commissioner's judgment are so diffuse and obscure that this Court is constrained to comment most adversely thereon. In previous cases this Court has indicated that it is not its function 'to interpret' grounds of appeal or to wade through long arguments purporting to be the grounds of appeal. Practitioners in the Appellate Court are expected to know the requirements of the Court in this respect. Since, however, there is a general misconception in the matter, this Court indicates that where the appeal is based on fact it will suffice to state that the judgment is against the weight of the evidence, without setting out any portion of the evidence. Where it is alleged that the judgment is not in accordance with law that fact should be stated as a specific ground of appeal, and the law involved should be stated briefly."

These strictures apply with equal force in this matter. Lengthy and argumentative grounds have been filed. They introduce not only the basis of the appeal but also arguments in favour of the contentions put forward. Grounds of appeal should be confined to judgments being bad in law or against the weight of evidence and probabilities of the case. When the judgment is bad in law the Court requires only notice of the wrong conclusion of law appealed against. The proper form of presenting argument thereanent is in this Court itself. Evidence being lengthy and confused, the bare statement that the judgment is against the weight of evidence and the probabilities of the case will suffice.

Considerable difficulty has been given this Court in interpreting the grounds of appeal in this matter but they have finally been crystallized as being:—

(1) That the judgment is bad in law in that (*a*) in a spoliatory action defendant as kraalhead is not liable in Native Law for the torts of his wife; (*b*) under Native Law and Custom no tort was committed;

(*c*) that the action being one of spoliation is based on Common Law in which the doctrine of kraalhead responsibility finds no place; (*d*) that defendant's wife should have been joined with defendant in this action.

(2) That the judgment was against the weight of evidence and the probabilities of the case.

The custom of *isichewula* or *nqutu* is an accepted custom in Native Law but it is not practised by all tribes. It is not recognised amongst the Pondos—*vide* Ncekana *v.* Ntshivana, 3 N.A.C. 206. The opinion was expressed in Siposo Damane *v.* Telepula, 3 N.A.C. 207, that this custom is not practised by the Pondomise but in that case although the parties belonged to the Pondomise tribe they resided in Pondoland, the customs of which were applied. In Thomas Kwatsha *v.* Bethwell and Ben Sihluku, 1931 N.A.C. (C. & O.) 1, it was held that the Fingoes practised this custom. In Mehlomane *v.* Kwatsha, 1 N.A.C. 33, the learned President (J. H. Scott) said: "There can be no doubt that the nqutu beast is recoverable and by an action at law if necessary." But there is no indication as to the tribe to which the parties belonged. In Maqosha Mbulungwana *v.* Kokani Mbulungwana, 1929 N.A.C. (C. & O.) 8, it was said (Mr. J. M. Young, President): "It is true that the nqutu custom is not generally observed in Pondoland but instances of its being followed are not unknown." During the existence of this Court many cases have come before it to show that the custom of *isihewula* is being followed even among the tribes to whom the custom does not apply. It follows therefore that consideration must be given to the proposition as to whether the custom is enforceable in Courts of Native Commissioners where such custom is foreign to the tribe concerned.

The Assessors who were consulted in this matter and whose replies are appended unanimously state that this custom is foreign to the Tembu and Pondimise tribes and is practised by the Hlubi and Fingo tribes. As against this we are confronted with the many cases in appeal to this Court relating to this custom. See Caleb Skenjana *v.* Gush Guza and Others, 1944 N.A.C. (C. & O.) 102. Which comes from Tsolo district where there are Pondomise people. It is, however, apparent from the cases heard on appeal in this Court that in none of those cases was the question, whether the custom was practised by the parties or not, brought into the Court's orbit and in consequence that aspect has not received consideration.

It is specifically provided in section 11 (1) of Act No. 38 of 1927 that the Native Commissioner is given a discretion to decide questions between Native and Native according to Native Law applying to the customs concerned except in so far as such Native Law shall have been repealed or modified. The Native Law applied however shall not be opposed to the principles of public policy or natural justice.

In Mltoya *v.* Mngayi, 1 N.A.C. 182, it is stated that the nqutu custom being based on spoliation is no longer operative. In Tlaba *v.* Jordan, 3 N.A.C. 207, and in Mehlomane v. Kwatsha *supra* it is clearly laid down that the custom in its true essentials does not permit of spoliation and amongst those tribes to whom the custom applies and provided the custom is followed under circumstances in which there is no suggestion of spoliation it would appear that the custom is on all fours with the right of action for damages at Common Law for seduction and might be considered to be in accordance with the principles of public policy and natural justice.

Now it seems that instead of this custom being repealed or modified there is evidence that its application is spreading to tribes which formerly did not apply it. This case is one in point. While in Damane *v.* Telepula *supra* it was said that evidence showed that it was being introduced informally. In Mbulungwana *v.* Mbulungwana *supra* is authority that it is being practised in Pondoland. It may therefore be accepted that the custom, not having been modified or repealed but rather extended in its application, is one in respect of which the Native Commissioner is entitled to take cognisance in the exercise of the discretion conferred on him by section 11 (1) of Act No. 38 of 1927. From his judgment the Assistant Native Commissioner clearly applied Native Law and custom and there is nothing to say that in so doing he did not exercise his discretion judicially. That point was not raised in argument but we nevertheless feel it necessary to mention it.

Briefly the facts in this case are that defendant's daughter eloped with a man Mangwana and after a short absence was returned to her people and found to have been deflowered. From defendant's case it appears that some negotiations occurred and at the close thereof defendant's wife and some other women proceeded to

plaintiff's kraal informed him that they demanded an isihewula beast and subsequently they took it off the commonage. This beast was slaughtered in accordance with custom and this action resulted therefrom. There is a conflict of evidence between that adduced by plaintiff and that adduced by defendant, the former denying the prior negotiations, liability as kraalhead for the seducer and that any opportunity was afforded him of replacing the seized beast with another. Defendant's case is that these essentials of the custom were followed but we are not required to decide which party is to be believed because our decision has been arrived at on other grounds.

The Assessors' opinion that this custom is foreign to the Pondomise and Tembu tribes is accepted by this Court as a correct statement and that opinion is supported by previous decisions of this Court. This Court is empowered to take judicial notice of the fact that Ngcanasa's or Upper Tyira Location and Sulenkama Location in Qumbu district are locations falling under the Pondomise tribe and that the parties to the action are therefore members of the Pondomise tribe. There is no doubt that this custom is foreign to the original customs followed by the Pondomise, but it requires to be decided whether, having regard to the evidence of previous decided cases of the informal extension of this custom to tribes to whom it is foreign, this Court can say that the custom should be accepted as having been adopted by the Pondomise people and therefore enforceable in our Courts. The conclusion arrived at is that no such position can be accepted. At pages 156 and 162 of Whitfield's *S.A. Native Law,* reference is made to the inclusion in dowries of a nqutu beast which is an acknowledgment to the mother-in-law of the care taken of the bride during her maidenhood. The decision in Mangwanya *v.* Mtambeka, 1 N.A.C. 42, is authority for this statement. The mqobo beast included in the Basuto and Hlubi dowries is the equivalent amongst those people of the nqutu beast which is so called by the Xesibe and Baca peoples (Mangwanya *v.* Mtambeka *supra,* Sofonia Ngqeleni *v.* Zwelonke Gaveni, 6 N.A.C. 38). No where can authority be found for any statement that a nqutu or mqobo beast is included in the dowry paid by the Pondomise people. Now the Appeal Court has accepted the opinion of the Assessors in the case of Thomas Kwatsha *v.* Betwell and Ben Sihluku supra where it is said that the taking of the *isehewula* beast would dispose of the seduction and no further beast would be payable. This opinion is in accord with that expressed by the assessors who were consulted in this matter and is accepted by this Court as settled Native Law. Amongst the Pondomise, Pondo, Tembu and other tribes it is settled Native Law that the father of the deflowered girl has an action at Native Law against the girl's seducer and/or his kraalhead for two head of cattle or their value for the specific seduction. This right of action is confirmed by the decision in *ex parte* Minister of Native Affairs *in re* Yabo *v.* Beyi, 1948 S.A.L.R. (1), p. 388, and there is no doubt that this right of action existed in Native Law among the Pondomise and Tembu tribes in the early stages of their evolution and before the informal introduction among them of the custom of isihewula. The conclusion arrived at on these premises is, that the latter custom is foreign to the Pondomise tribe, is quite unnecessary in view of the right of action for damages for seduction and is not recognisable in our Courts. Logically it may be said that such a conclusion is applicable to all tribes practising that custom but that it is not a point on which a decision is required.

Having arrived at this conclusion it follows that the question next for consideration is whether the correct action available to the wronged possessor is one at Common Law for spoliation or whether a similar action under Native Law is open to him. If the latter is found to be the case then on the authority of section 11 (1) of Act No. 38 of 1927 that law should be applied in Native Commissioners' Courts. The Native Assessors have expressed the opinion that the possessor wrongfully deprived of his beast under this custom has an action at Native Law. This opinion is accepted by the Court as correct. The cases which have in the past come before this Court on appeal have been for the recovery of the spoliated animal because of some defect in fulfilling the essentials of the custom. Skenjana *v.* Gush Guza and Others supra is the latest in point and in that case the plaintiff succeeded in recovering his animal. If a litigant has a right of action when one of the essentials of the custom have not been carried out *a fortiori* a litigant must have a right of action where he has suffered loss through the application of a non-applicable custom. It must be readily agreed—and there is ample authority for this statement—that theft in Native Custom is a civil wrong and that the wrongdoer there may be haled before his Chief and Inkundla and recovery of the property ordered.

In the face of the positive statement of the Assessors in this matter, whose opinions have in regard to the application of the *isehewula* custom been proved correct, there is in our opinion conclusive proof that their statements that an action lies in Native Law for the spoliation of a beast are in accord with pure Native Law and Custom.

This Court is satisfied therefore that an action under Native Customs lies for spoliation where such spoliation is sought to be justified under colour of right of custom.

In Ntenteni *v.* Nyantweni Nkohla, 1 N.A.C. 172, it is stated that "the responsibility of the head of the kraal for torts committed by members of his kraal is a condition peculiar to Native Custom and there is no corresponding provision to be found in Colonial Law". This statement of Native Law is borne out by the provisions of section 11 (3) (*b*) of Act No. 38 of 1927 which say that a native woman who is a partner in a customary union and who is living with her husband shall be deemed to be a minor and her husband shall be deemed to be her guardian. "That a kraalhead is liable for the torts of a minor inmate of his kraal is borne out in the judgments in Sifuku *v.* Mboswana and Ano., 1 N.A.C. 222, and Skenjana and Ano. *v.* Geca, 6 N.A.C. 4. The judgment in Mamjudu Mlanjeni *v.* Qatsi Macala, 1947 N.A.C. (C. & O.) 13, clearly establish the doctrine of kraalhead responsibility. In addition the Assessors have said that the kraalhead (husband) is liable for the torts committed by his wife and their opinion is in accord with established law. It is, however, established law that the kraalhead and the tort-feasor should be joined as co-defendants. (See Skenjana and Ano. *v.* Gece *supra.*) This has not been done in this matter and on that ground the appeal must succeed. To permit of plaintiff remedying his defective position absolution is ordered. The appeal is allowed with costs and the judgment of the lower Court is altered to read "Absolution from the instance with costs".

Questions to Assessors.

[*Names of Assessors:* John Ngcwabe (Cofimvaba), E. C. Bam (Tsolo), Dumalisile Mbekeni (Engcobo), Bazindlovu Holomisa (Mqanduli), Ntabezulu Mtirara (Umtata).]

Question: What tribes follow the "Isehewula" or "Nqutu" custom?

Answer by—

John Ngcwabe: The custom is not practised in Tembuland.

E. C. Bam: The custom is not practised by the Pondomise.

Dumalisile Mbekeni: The custom is practised by the Hlubis and other Fingo tribes.

Question: Is there any difference between the "Isihewula" and the "Nqutu" custom?

Answer by E. C. Bam: They are the same.

Question: What are the essentials of the custom?

Answer by E. C. Bam: When a young man "metshas" with a girl and the girl reports to her mother, the mother reports to the other women and the father. Even if they have not told the father the women go to the young man's home. They pick the best ox and drive it off to their home. When they arrive they are assisted by the men in slaughtering it and they then eat it.

Question: Can the owner redeem the best ox by replacing it with another?

Answer by E. C. Bam: That has never happened. The women do not speak to any one at the time.

Question: If a beast is taken does that affect the damages payable for seduction?

Answer by E. C. Bam: That beast settles the claim. There is no further beast payable as damages for seduction, but if pregnancy ensues four further head are added.

Question: Can a beast be taken from the grazing ground or must it be taken at the kraal of the seducer?

Answer by E. C. Bam: They can take it anywhere as long as they satisfy themselves that it belongs to the boy's kraalhead.

Question: Is it necessary for the kraalhead of the girl to know of the action?

Answer by E. C. Bam: No.

Question: Is the owner of the beast given the reason for the taking of his beast?

Answer by E. C. Bam: He is usually not informed, but if he asks he is informed. He sees on his own that it is being taken.

Question: Has the practice spread from the Fingoes and Hlubis to other tribes?

Answer—All Assessors: We do not know of any spread.

Question: Would it make any difference if the seduced girl merely reported without being examined?

Answer by E. C. Bam: If the girl reports the women are compelled to examine her. They cannot go without the examination.

Question: What would be the position if the seduction was successfully denied?

Answer by E. C. Bam: Nothing could be done as the women would already have eaten the beast.

Question: Has the owner no remedy?

Answer by E. C. Bam: No.

Question: Why don't the Pondomise follow the custom?

Answer by John Ngcwabe: It is a bad custom.

All Assessors agree.

Question per Mr. Hughes: Is your knowledge hearsay from tribes who practise the custom?

Answer by E. C. Bam: We learn this from association with people who do practise it.

Question per Mr. Muggleston: Do you know of any occasions when this custom was practised among the Pondomise or Tembus?

Answer by—

E. C. Bam: I have never heard of it among the Pondomise.

Dumalisile Mbekeni: I have never heard of it among the Tembus.

Question: If a Pondomise or Tembu practises it, is he going contrary to his own custom?

Answer—Unanimously: Greatly. (Among the Pondomise and Tembus.)

Question: Where the custom is not practised would the kraalhead of the women be responsible?

Answer—Unanimously: The husbands of the women would be liable.

Question: If a man wrongfully deprives another of a beast in circumstances not amounting to theft, what right of action exists in pure Native Law?

Answer by J. Ngcwabe: The owner lays a charge at the Great Place and the Chief is empowered to hear that complaint.

Question: If the Chief is satisfied in regard to the complaint can he order anything to be paid in addition to the restoration of the beast?

Answer by J. Ngcwabe: The Chief's Court can impose a penalty.

Question: If a man's wife assaults another man, what remedy lies for the second man where no blood has been drawn?

Answer by E. C. Bam: He can sue the woman in the Chief's Court. When she goes to Court she is accompanied by her husband and the penalty imposed is paid out of his property.

Question: If A's wife burns the kraal of B, has B any action in Native Law against A?

Answer: In this case also the woman is sued and if the charge is proved she is fined. The fine is paid by the husband.

Question: What would be the position if the person wronged charged the husband instead of the woman?

Answer by J. Ngcwabe: That case would be thrown out and the husband would be sent to call his wife.

All the Assessors are in agreement with these replies.

Question by Mr. Hughes: If a child destroys someone's crops; can the owner of the crops sue the father in the Chief's Court?

Answer by J. Ngcwabe: The owner sues the father.

Question: Is the child then called as a witness?

Answer by J. Ngcwabe: Yes.

Question: If a woman destroys the crops; is the husband sued and the women merely called as a witness or is the woman sued?

Answer by J. Ngcwabe: The woman is sued as she is an old person and the Court demands that the husband appear with her.

Question: Why is this?

Answer by J. Ngcwabe: Because she is not taken as a child. According to our custom if a woman does a wrong, she is sued because the husband must consult her in regard to anything done at the kraal. The status of a woman is different from that of a child.

Question: You have stated that if blood is not drawn a man can sue a woman for assault. What is the position if blood is drawn?

Answer by E. C. Bam: There is no difference. According to Native Custom the kraalhead is responsible for damages for assaults committed by inmates of the kraal. He pays for all wrongs committed by members of his family.

Question: It is not correct that any fine for assault accrues to the Chief?

Answer by J. Ngcwabe: The fine is given to the Court.

Question: And what happens to the fine in a case where a woman burns a kraal or crops?

Answer by J. Ngcwage: There is a difference. When crops or a kraal are burned the owner must be compensated. The messenger who is sent to call the parties also gets a share of what is paid.

Question: Is it a principle that blood belongs to the Chief and other property to the injured person.

Answer by J. Ngcwabe: Yes.

Other Assessors all agree.

For Appellant: Mr. Mugglestone, Umtata.

For Respondent: Mr. Hughes, Umtata.

CASE No. 34.

STENA NKALATYA *v.* **MANELI MYOLI.**

UMTATA: 22nd October, 1948. Before Cornell (Acting President), Midgley and Blakeway, Members of the Court Southern Division).

Native Appeal Case—Native Custom—Putuma of boy—Practice and Procedure—Credibility of witnesses—Sondlo.

Appeal from the Court of the Native Commissioner, Umtata.

Midgley (Member) delivering the judgment of the Court:

In the Court below the plaintiff sued defendant for five head of cattle and nine goats or their value £54 and furnished the following particulars of claim:—

1. The parties to this action are Natives as defined by the Act.
2. Plaintiff is the owner of—
   (*a*) five goats and their progeny four kids;
   (*b*) five cattle, viz., a mpemvukazi cow, a ngqabekazi cow, a red rwanqakazi cow, a ngilakazi heifer and a red rwanqakazi heifer.
3. During or about May, 1946, defendant wrongfully and unlawfully removed the above-mentioned stock from plaintiff's possession.
4. Despite due demand therefor defendant failed to deliver to plaintiff the said stock.

Plaintiff filed a replication to the plea denying all the allegations in the plea save for admissions previously made.

The Native Commissioner entered judgment for plaintiff as prayed with costs.

An appeal is brought against this judgment on the grounds that the judgment is against the weight of evidence and probabilities of the case.

It is common cause that plaintiff is the grandson of the late Soxwana and that he lived with Soxwana since he can remember until he left to be circumcised about 1946. He now lives with his father at Kambi. Defendant is the heir of Soxwana who died about five years ago.

Plaintiff's case is that Soxwana gave him a she goat which has had increase and at the time of issue of summons there were nine goats. Soxwana also gave him a heifer which has increased by four making five in all.

The four cattle alleged to be progeny of the original heifer were described by plaintiff as: 1. Black heifer with spotted forehead. 2. Red heifer with white belly. 3. Red heifer with white belly. 4. Red heifer calf with white throat, the last mentioned being calf of No. 1. Plaintiff says that all these cattle bear his earmark which is slit on left ear and swallowtail right ear and skey in front. He places the value of £45 on the five cattle and nine (£9) for the goats, and this value has not been challenged.

Plaintiff further states that Hokwana and Mapunum were present when the stock was given to him.

Mapununu gave evidence for the plaintiff and confirmed the alleged gift of a goat and a heifer. He said the goats were marked with plaintiff's earmark. He says the heifer which Soxwana gave to plaintiff was a red heifer with a white belly and it was earmarked with plaintiff's earmark. The other four progeny of the original were not marked. This witness also states that Hokwana was present when the gifts were made. John Fitega supported plaintiff in regard to the red heifer which he says Soxwana pointed out to him as the beast which he gave to plaintiff.

It appears that plaintiff is sickly and the Native Commissioner took judicial notice of the fact that he is a hunchback.

Defendant admits that plaintiff received a gift of a goat and that it has now increased to five. He says the goat was given to plaintiff on condition that plaintiff could take it when he was one day *putumaed*. He denies the gift of a heifer to plaintiff and states he has no cattle belonging to plaintiff in his possession.

Defendant admits in his evidence that the original red and white heifer has four progeny and states he received only three cattle from Soxwana. He says one cow was given by Soxwana to his daughter as *ubulunga* and this cow has a calf. Defendant further states that all his cattle are earmarked but not those received from Soxwana.

The Native Commissioner rejected defendant's evidence and found that the five cattle and nine goats were plaintiff's property. This Court is now asked to say that that finding was wrong. It must be remarked at the outset that whereas plaintiff alleged in his summons that defendant had wrongfully and unlawfully removed the stock claimed from plaintiff's possession there is no evidence to support this allegation. This allegation was obviously made in error because all the evidence by both parties goes to show that possession was from the very outset with Soxwana at his kraal where plaintiff lived and it is obscure from the evidence where the cattle are now located. It is true that plaintiff has adduced no proof of his ownership other than the bald statements of his witnesses and himself that the gifts were made and there is the discrepancy in regard to the earmarks between his statement and that of Mapununu.

But as the only other witness to the donation was Hokwana and as the stock is with defendant it is difficult to see what more plaintiff could have done to bring proof of his claim.

It is admitted by defendant that four of the cattle described do exist and plaintiff may have called upon him to produce them to the Court for inspection but this course was equally and more readily open to defendant who disputed the earmarks.

Furthermore, plaintiff, in our opinion, having made out a prima facie case, defendant did nothing to prove the alleged gift of *ubulunga* beast to Soxwana's daughter. Nobody was called to substantiate this. There is also this weakness in defendant's case that he makes no mention of the original beast having been slaughtered. Hokwana says defendant slaughtered it. Mpayipeli says Soxwana slaughtered it.

Defendant and his witnesses all testify to the condition upon which plaintiff was given the goat. From the replies by the Assessors on this point it is clear that such a condition is not in accordance with custom and we can only conclude that it has naïvely been introduced to cover defendant's refusal to deliver the five goats which he admits belong to plaintiff. He also makes a claim for *sondlo*. Here again it does not seem that he is supported by custom for it is clear that plaintiff left Soxwana's kraal at about the time he attained majority and there is no proof that plaintiff was placed with Soxwana to be maintained there.

Moreover it is significant that defendant in claiming *sondlo* is proceeding contrary to Native Law and Custom and that, had he succeeded in his claim, the five goats which he admits are plaintiff's property would accrue to him in part settlement of his claim. He is thus endeavouring to put up a defence of set off in respect of the five goats claimed for he says: "I will hand over the goats when his father pays *sondlo*."

The principles to be applied by an Appellate Court when considering an appeal on the grounds of credibility of witnesses have frequently been enunciated by the Appellate Division of the Supreme Court and dicta will be found in the following cases which go to show that a Court of Appeal must be convinced that the Lower Court's decision is wrong before it will upset it and due weight must be given to the fact that the trial Court has seen and heard the witnesses and is in a better position to estimate the credence to be placed on their testimony. The appellant must satisfy the Court that the trial Court was wrong and that its decision ought to have been the other way. Where there is a conflict of evidence the Appeal Court will have special regard to the fact that the trial Court saw the witnesses. See Acutt *v.* Sella Pr and Development Co., 1907 T.H. 808; Bicton *v.* Rosenberg, 1936 A.D. 380; Van der Schyf *v.* Loots, 1938 A.D. 137, and Annama *v.* Chetty, P.H. 1946 (1) F. 3.

Having regard to all the circumstances of this case, particularly the Native Commissioner's impressions in regard to the witnesses and applying these principles, we are not satisfied that the Native Commissioner's judgment has been shown to be wrong.

The appeal is dismissed with costs.

Cornell (Acting President): I concur.

Blakeway (Member): While I am doubtful of plaintiff's story regarding the heifer and its progeny I am not convinced that the Native Commissioner came to a wrong conclusion after hearing the witnesses and on the principles enunciated in the case of Annama *v.* Chetty *supra* I am bound to agree with the majority judgment.

For Appellant: Mr. Hughes, Umtata.

For Respondent: Mr. Airey, Umtata.

Questions to Assessors.

Question: What is the meaning of the word "Putuma" and has it any significance?

Answer by J. Ngcwabe: Putuma just means to fetch something and has no significance beyond that.

Question: Has it no special meaning when a woman is telekaed?

Answer by J. Ngcwabe: If a woman is telekaed a beast is paid when her husband fetches her and she then changes publicly from her people's kraal to her husband's but there is no ceremony.

Question: When a boy is living with his grandfather and has then received stock it is usual to "putuma" him?

Answer by D. Mbeleni: He can go without being fetched. It is not customary to withhold the stock because the boy has not been "putumaed" when he is young and sondlo is payable.

Question: Would it make any difference if the boy was sickly?

Answer by J. Ngcwabe: He must be "putumaed". If he is old and has rendered services no sondlo is payable.

Question: Is it usual to give a boy a fee at his grandfather's kraal for his services?

Answer by J. Ngcwabe: It is not usual, but it is done.

Question by Mr. Hughes: If a boy grows up at his maternal grandfather's kraal, would it be in order to say that he is to be given a goat which he can take away when he is "putumaed"?

Answer by E. C. Bam: According to custom you cannot make a condition like that. The boy can take the goat when he leaves.

All agree.

Question: What is the position if the boy comes as a herd boy and is given the goat as a fee?

Answer by E. C. Bam: It is unusual for a boy to be engaged as a servant at his mother's people's kraal.

Question: Is the grandfather's heir entitled to keep a goat given under such circumstances until "sondlo" is paid?

Answer by J. Ngcwabe: "Sondlo" is only payable if the boy leaves before he renders service. Not if he leaves as a grown man.

Question: If he goes as a small boy and "sondlo" is payable and the grandfather dies can the heir hold any gifts made to the small boy until "sondlo" is paid?

Answer by E. C. Bam: They cannot do that. The child can leave with his stock and the kraalhead then has a claim against the child's father for "sondlo". If the child has stock with his mother's people he can pay the sondlo out of that if he wishes, but it cannot be impounded for the purpose.

Question by Mr. Hughes: If the maternal grandfather gives the boy goats and then dies and the kraal is taken over by the grandfather's heir, should the boy say he wants to go home with his stock, can the heir refuse to release him until he pays "sondlo"?

Answer by—

Mtirara: No. He must go to the father of the boy.

J. Ngcwabe: He cannot impound the stock.

Question: What is the position when a girl lives with her mother's people?

Answer by E. C. Bam: If a girl lives at a kraal no "sondlo" is payable.

Question: When is "sondlo" payable?

Answer by E. C. Bam: According to Xhosa Custom any child taken to its mother's people for keeping should be released by payment of "sondlo" irrespective of sex except when it is borrowed by the mother's people for nursing or herding or something of that nature no "sondlo" is then payable. Sometimes a boy who is borrowed for herding is given a gift, but not as a reward for his services.

Question: Would such a gift be confined to small stock or could it include large stock?

Answer by E. C. Bam: It depends on what they want to give; there is no restriction.

Question: What is meant by the colour "mpemvukazi"?

Answer by—

E. C. Bam: Among the Pondomises it is a black animal with a white face.

Mtirara: Among the Tembus it is a red or black beast with small white spots on the face.

Bazindlovu: These terms are not customary. Individuals differ in their use of these descriptions.

Question: What colour is "rwanqa"?

Answer by E. C. Bam: This is a red or black beast with a white belly.

All agree.

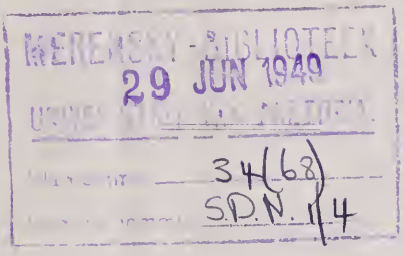
Question: What is a "ngqilakazi" beast?

Answer by E. C. Bam: This has a red body with a white throat but these terms are not consistently applied.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT



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